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Modern Legal Philosophy Series

RATIONAL BASIS OF LEGAL INSTITUTIONS

BY

VARIOUS AUTHORS

WITH AN EDITORIAL PREFACE BY

JOHN H. WIGMORE

AND ALBERT KOCOUREK

Professors of Law in Northwestern University

AND

AN INTRODUCTION BY

OLIVER WENDELL HOLMES

Justice in the Supreme Court of the United States

New York

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GENERAL INTRODUCTION TO THE SERIES

By the Editorial Committee

"Until either philosophers become kings," said Socrates, "or kings philosophers, States will never succeed in remedying their shortcomings." And if he was loath to give forth this view, because, as he admitted, it might "sink him beneath the waters of laughter and ridicule," so to-day among us it would doubtless resound in folly if we sought to apply it again in our own field of State life, and to assert that philosophers must become lawyers or lawyers philosophers, if our law is ever to be advanced into its perfect working.

And yet there is hope, as there is need, among us to-day, of some such transformation. Of course, history shows that there always have been cycles of legal progress, and that they have often been heralded and guided by philosophies. But particularly there is hope that our own people may be the generation now about to exemplify this.

There are several reasons for thinking our people apt thereto. But, without delaying over the grounds for such speculations, let us recall that as shrewd and good-natured an observer as DeTocqueville saw this in us. He admits that "in most of the operations of the mind, each American appeals to the individual exercise of his own understanding alone; therefore in no country in the civilized world is less attention paid to philosophy than in the United States." But, he adds, "the Americans are much more addicted to the use of general ideas than

the English, and entertain a much greater relish for them." And since philosophy is, after all, only the science of general ideas — analyzing, restating, and reconstructing concrete experience—we may well trust that (if ever we do go at it with a will) we shall discover in ourselves a taste and high capacity for it, and shall direct our powers as fruitfully upon law as we have done upon other fields.

Hitherto, to be sure, our own outlook on juristic learning has been insular. The value of the study of comparative law has only in recent years come to be recognized by us. Our juristic methods are still primitive, in that we seek to know only by our own experience, and pay no heed to the experience of others. Our historic bond with English law alone, and our consequent lack of recognition of the universal character of law as a generic institution, have prevented any wide contact with foreign literatures. While heedless of external help in the practical matter of legislation, we have been oblivious to the abstract nature of law. Philosophy of law has been to us almost a meaningless and alien phrase. "All philosophers are reducible in the end to two classes only: utilitarians and futilitarians," is the cynical epigram of a great wit of modern fiction.[1] And no doubt the philistines of our profession would echo this sarcasm.

And yet no country and no age have ever been free (whether conscious of the fact or not) from some drift of philosophic thought. "In each epoch of time," says M. Leroy, in a brilliant book of recent years, "there is current a certain type of philosophic doctrine — a philosophy deep-seated in each one of us, and observable clearly and consciously in the utterances of the day — alike in novels, newspapers, and speeches, and equally in town

[1] M. Dumaresq, in Mr. Paterson's "The Old Dance Master."

and country, workshop and counting-house." Without some fundamental basis of action, or theory of ends, all legislation and judicial interpretation are reduced to an anarchy of uncertainty. It is like mathematics without fundamental definitions and axioms. Amidst such conditions, no legal demonstration can be fixed, even for a moment. Social institutions, instead of being governed by the guidance of an intelligent free will, are thrown back to the blind determinism of the forces manifested in the natural sciences. Even the phenomenon of experimental legislation, which is peculiar to Anglo-American countries, cannot successfully ignore the necessity of having social ends.

The time is ripe for action in this field. To quote the statement of reasons given in the memorial presented at the annual meeting of the Association of American Law Schools in August, 1910: —

> The need of the series now proposed is so obvious as hardly to need advocacy. We are on the threshold of a long period of constructive readjustment and restatement of our law in almost every department. We come to the task, as a profession, almost wholly untrained in the technic of legal analysis and legal science in general. Neither we, nor any community, could expect anything but crude results without thorough preparation. Many teachers, and scores of students and practitioners, must first have become thoroughly familiar with the world's methods of juristic thought. As a first preparation for the coming years of that kind of activity, it is the part of wisdom first to familiarize ourselves with what has been done by the great modern thinkers abroad — to catch up with the general state of learning on the subject. After a season of this, we shall breed a family of well-equipped and original thinkers of our own. Our own law must, of course, be worked out ultimately by our own thinkers; but they must first be equipped with the state of learning in the world to date.
>
> How far from "unpractical" this field of thought and research really is has been illustrated very recently in the Federal Supreme Court, where the opposing opinions in a great case (*Kuhn* v. *Fairmont Coal Co.*) turned upon the respective conceptions of "law" in

the abstract, and where Professor Gray's recent work on "The Nature and Sources of the Law" was quoted, and supplied direct material for judicial decision.

Acting upon this memorial, the following resolution was passed at that meeting: —

That a committee of five be appointed by the president, to arrange for the translation and publication of a series of continental master-works on jurisprudence and philosophy of law.

The committee spent a year in collecting the material. Advice was sought from a score of masters in the leading universities of France, Germany, Italy, Spain, and elsewhere. The present Series is the result of these labors.

In the selection of this Series, the committee's purpose has been, not so much to cover the whole field of modern philosophy of law, as to exhibit faithfully and fairly all the modern viewpoints of any present importance. The older foundation-works of two generations ago are, with some exceptions, already accessible in English translation. But they have been long supplanted by the products of newer schools of thought which are offered in this Series in their latest and most representative form. It is believed that the complete Series represents in compact form a collection of materials whose equal cannot be found at this time in any single foreign literature.

The committee has not sought to offer the final solution of any philosophical or juristic problems; nor to follow any preference for any particular theory or school of thought. Its chief purpose has been to present to Anglo-American readers the views of the best modern representative writers in jurisprudence and philosophy of law. The Series shows a wide geographical representation; but the selection has not been centered on the notion of giving equal recognition to all countries. Primarily, the design has been to represent the various

schools of thought; and, consistently with this, then to represent the different chief countries. This aim, however, has involved little difficulty; for Continental thought has lines of cleavage which make it easy to represent the leading schools and the leading nations at the same time.

To offer here an historical introduction, surveying the various schools of thought and the progress from past to present, was regarded by the committee as unnecessary. The volumes of Dr. Berolzheimer and Professor Miraglia amply serve this purpose; and the introductory chapter of the latter volume provides a short summary of the history of general philosophy, rapidly placing the reader in touch with the various schools and their standpoints. The Series has been so arranged (in the numbered list fronting the title page) as to indicate the order of perusal most suitable for those who desire to master the field progressively and fruitfully.

The committee takes great pleasure in acknowledging the important part rendered in the consummation of this project, by the publisher, the authors, and the translators. Without them this Series manifestly would have been impossible.

To the publisher we are grateful for the hearty sponsorship of a kind of literature which is so important to the advancement of American legal science. And here the Committee desires also to express its indebtedness to Elbert H. Gary, Esq., of New York City, for his ample provision of materials for legal science in the Gary Library of Continental Law (in Northwestern University). In the researches of preparation for this Series, those materials were found indispensable.

The authors (or their representatives) have cordially granted the right of English translation, and have shown a friendly interest in promoting our aims. The committee would be assuming too much to thank these learned

writers on its own behalf, since the debt is one that we all owe.

The severe labor of this undertaking fell upon the translators. It required not only a none too common linguistic skill, but also a wide range of varied learning in fields little travelled. Whatever success may attend and whatever good may follow will in a peculiar way be attributable to the scholarly labors of the several translators.

The committee finds special satisfaction in having been able to assemble in a common purpose such an array of talent and learning; and it will feel that its own small contribution to this unified effort has been amply recompensed if this Series measurably helps to improve and to refine our institutions for the administration of justice.

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EDITORIAL PREFACE

"We are only at the beginning of a philosophical reaction, and of a reconsideration of the worth of doctrines which for the most part still are taken for granted without any deliberately conscious and systematic questioning of their grounds." — Mr. Justice Oliver Wendell Holmes (Collected Legal Papers).

---

1. It was Lord Esher, Master of the Rolls, that eminent representative of judicial wisdom, who made the remark, in a formal opinion from the bench:[1] "There has been a great searching for reasons for these rules. But it *does not signify what the reasons for them are*, if they are well-recognized rules which have existed from time immemorial."

The spirit of the present work can best be epitomized by stating that it is the exact opposite of the distinguished jurist's pronouncement.

The object here is to set forth the principal reasons on which our fundamental and immemorial legal institutions have been rationally supported or assailed.

These institutions have come down unquestioned, in the memory of the past generation of lawyers. Whatever questioning may have taken place in the realms of philosophy, of ethics, of economics, of social science, has not disturbed the mental peace of the legal profession, nor even come to its notice. The calm of the solid ocean surface of the Is has prevailed. Reversing Descartes' famous phrase, the lawyers have been satisfied to announce, "These things Exist, therefore we do not need to Think." And it is this attitude which is typified in Lord Esher's phrase.

[1] In *Mexborough* (Earl of) *v. Whitley Council*, L. R. [1897] 2 Q. B. 115.

But new times have been coming, — nay, are now here. The outermost circle of that wave of scientific rationalism which began in the Darwin-Huxley period has at last reached the Saragossa sea of the Law. Rationalism asks that every existing thing be explained, by reasons for its existence. This attitude, gradually appearing here and there in particular parts of the law, now insists on being applied to the fundamentals also, — those underlying postulates which have hitherto lain too deep and too broad to need or to permit being questioned.

Not indeed that they have not been duly questioned, explained, and defended hitherto, in other regions of thought; for the writings of the philosophers and the economists have for centuries included these legal institutions in their exegeses. But those speculations — as the lawyers might term them — have not been deemed by the legal profession to be any part of its own natural data. For at all times, and increasingly in the present generations, the Law as it Is has seemed a vast enough task, for mastery and for practice, without laboring to speculate upon its ultimate foundations and horizons.

Of late, however, the theories of the philosophers, the economists, and the sociologists, have passed out into the world of general debate and current politics. The fundamentals of the law are discussed by the Man in the Street. And so, the Lawyer can no longer afford to ignore them. They have ceased to be closet theses, and have become popular themes. When the educated (or half educated) public begins to discuss the rationality of fundamental legal institutions, the lawyer too must equip himself in those themes. They come home to him for reflection as a professional master of the law.

Hence this book.

2. The passages here compiled represent *systems of thought*, *i.e.* the rational basis of fundamental legal institutions as expounded in connection with some general

scheme of Life, — not merely casual comments on some specific institution. The systems of thought, broadly classified as to their basis, may bear any philosophical brand, — may be metaphysical or ethical or psychological or sociological or economical or pragmatic. But we have not thought it worth while to deal with any theory of legal institutions which did not at least connect itself with some fairly general scheme of things.

The pragmatic method, in a field so vast in time and area, is of course the least available and perhaps the most dangerous; yet it is also the most useful and the most needed; and a few passages are based on that method. The metaphysical method is out of date, in a sense; but it has served in the past; many famous names are united with it; and their expositions may at least furnish a helpful contrast. The ethical and the sociological systems have in general the widest representation in modern thinking, and many varieties of them are here shown.

No History, and no Evolution, social or legal, is meant to be touched upon in the passages here collected. The Rationality of existing institutions does doubtless involve auxiliary reference to History and Evolution. But it is distinct in itself from those; and the emphasis in this work is solely on Rationality. For History, the materials have already been collected in the Continental Legal History Series;[1] for Evolution, in the Evolution of Law Series.[2]

3. The selections are meant to range through *all schools of thought*, whether conservative or radical. Rational conviction is best reached by a fearless facing of all views purporting to be rational, however repulsive those views may be to our own bias or subversive of our own assumptions. The strength of mind of the coming genera-

[1] Eleven volumes; Boston, Little, Brown & Co., 1911+ (published under the auspices of the Association of American Law Schools).
[2] Three volumes; Boston, Little, Brown & Co., 1916+ (Kocourek and Wigmore).

tion of lawyers can best be developed by bringing them into contact with all theories (at least, with any theories supported in reputable quarters of thought or subject to be forced upon attention by popular debate), whether these theories happen to be liberal or reactionary, radical or conservative.

Nor do the Editors profess to set forth their own views in any place. Even their personal preferences of systems have been restrained. If they have inserted the now quaint-sounding expositions of Locke and Hegel, they have also included the modernities of Wells and of Tawney. If here are discovered the sober conservatism of Sidgwick and of Lecky, a place has also been found for the startling radicalism of Havelock Ellis and of Mrs. Parsons, and even for such a point of view as that of Veblen. "Tros Tyriusque mihi nullo discrimine agetur."

4. The *scope of topics* is limited to five *fundamentals*, viz. Liberty, Property, Succession, Family, Punishment.

This was because space did not permit adequate exposition of theories for further topical subdivisions.

Nevertheless, the method is applicable also to details, e.g. corporate personality, bankruptcy, principal's liability, interest on money, death by wrongful act, privilege for defamation, limitation of actions, and so on. Where this compilation is used as a class-room text, these minor problems may profitably be assigned for research and discussion. Naturally, with descent into details, the logical connection with broad general systems becomes less and less close; the rationality becomes more and more pragmatic and empiric; and the solutions vary more and more with locality and time. Some day, it may be hoped, the method of rationalization will be recognized in systematic treatment of all legal ideas, and not merely of the fundamental institutions.

5. These materials are intended primarily for *lawyers*, young and old. Every lawyer, judge, and legislator should prepare himself in this field.

But for the citizen at large they are also timely. The embryo citizen in college courses in sociology, ethics, economics, and political science, will find them germane to his problems; for underneath all those sciences are these fundamental legal institutions, and the formulation of them is the State's ultimate object.

6. It remains to sketch the *order of thought* in which these passages have been put together.

The five fundamental divisions of topics speak for themselves. They represent no accepted classification; but each is obviously a focus for discussion — a logical crossways-shield against which the contending theories hurl themselves.

I. *Liberty*. The main theme being Individualism versus State Control, the lists are naturally opened by the creed of Individualism, as it was still professed when the generation now retiring was in its college classes. SPENCER is the writer selected to open the discussion. He is followed by Bentham's pupil MILL, whose famous defense of Liberty is still a classic, and remains a pillar of argument to-day, founded as it is on permanent human nature, — even though we have long ago passed beyond the deadline of State interference as drawn by him. The later phrasing of a temperate and modified Individualism is then represented by SIDGWICK, and some of its specific jural applications by Jethro BROWN.

The next Topic is that ubiquitous phenomenon, Competition, which is ventilated in its moral aspect by LOVEJOY, followed by SHARP, and in its social working by BURGESS and PARK.

We are then introduced by BENTHAM to the utilitarian theory of the obligation of promises; and next, in the discussion of Mrs. BOSANQUET, to some pragmatic sug-

gestions of the breakdown of untempered Individualism; and this carries us to the full theory of State control of contract, as expounded by Ely.

Then follows Pound's masterly sketch of the gradual change of theory visible in American judicial opinion during the last fifty years. The series of essays on Liberty is closed by the balanced and persuasive résumé of Carver on the laissez-faire idea, which expounds the New Individualism.

II. *Property.* Here, before the curtain is raised, comes a prologue by Laveleye, describing summarily the various theories of Property advanced by all schools of thought; and an outline by Small, charting scientifically the sociological geography of the problem.

We then introduce the protagonist of the labor theory of Property, Locke, in his now famous passage, from which so many others have drawn their argument. He is followed by Hegel, whose metaphysical theory typifies the point of view that long sufficed in the philosophical world. Bentham's utilitarian theory then comes forward, to represent the dominant view that sufficed for another generation. The Topic closes with Lester Ward's biological theory of the basis of Property.

The scene is then shifted, to make way for the socialist theories. First comes a survey of the field by Lecky. From an embarrassing richness of material, we have here selected, as the exponent of the communistic theory of Property, Edmond Kelly. His name is perhaps not so well known as others'; but his exposition is lucid and complete, and his habit of mind as a practising lawyer must give a value to his views which might not be accorded to those thinkers who lack that experience. He is followed by Wells, who proposes a modified type of socialism. Then comes Veblen's ironic castigation of the modern industrial system, followed by Ryan's critique of the Henry George program. The Topic closes

with the forth-putting conservatism of More in his defense of private property.

The next Topic brings to the front various functional and social-trust theories of Property, represented by Duguit, Tawney, Mecklin, and concluding with a criticism by Hobson of the social-trust theory.

The last Topic is a review of modern trends of thought. It is opened by Wright, with his sane analysis of the fallacies of motive in socialistic ideals; who is followed by Hobhouse in a discussion of the orthodox and the non-orthodox views. Next Rashdall expounds the philosophical theories. Lindsay attempts to look into the future of property institutions; and the topic is closed by Holland with the often overlooked Christian point of view.

III. *Succession.* Historically, the modes of disposition of property after death lead us back through the varied institutions of all legal systems. But theoretically, the discussion is mainly of modern origin. These are times, however, when the basis for our laws of succession must receive candid consideration. The chapter opens with Bentham's utilitarian justification of the institution; followed by Cannan's interesting explanation of the inequality of incomes, — a topic definitely related to the idea of Succession. Next follows a pragmatic exposition of the actual economic and legal effects of one succession system, by Charmont. Next comes Sidgwick's theory of enlightened individualism. The topic is closed with McMurray's sketch of the various methods and theories of free testation.

IV. *Family.* Fiske's biological theory of the function of the family here serves for the opening: and this is followed by Ellwood's theory of its social function.

We then proceed to a discussion, by Dewey and Tufts, of the biologic and economic aspects of the family. The modern radical theories are then represented by Ellis,

who enlarges on the anachronistic survival of earlier legal theories in the world of modern science and morality; of PARSONS, who applies in the legal field the logical consequences of extreme modern feminism; and of CARSON, who expounds the social inaptness of the traditional views.

The series closes with CABOT'S matchless exposition of some of the more subtle and often forgotten aspects of the marriage institution.

V. *Punishment.* States have always conceived it their function to punish (or repress) crime. But statesmen and philosophers, amidst the stern realism of this daily practice, have never agreed as to the theory on which the State pursues crime. To clarify and agree upon the theory of Punishment (so called) is to advance the cause of efficient justice.

The various theories, from past to present, are summarily surveyed by WILLOUGHBY. A special place is then given to BRADLEY'S analysis of a fundamental element of the problem, viz. responsibility and determinism; and to VON BAR'S theory of moral reprobation, — the latter being a basic idea which is too much neglected in all modern discussions. The chapter closes with HALL'S exposition of the social significance of punishment, — a theory which reconciles us to the apparent endlessness of the problem of repression of crime.

7. The Editors, before making their final selection of passages, consulted more than a score of friendly advisers in the fields of law, philosophy, sociology, economics, and political science; and ransacked the shelves of four extensive libraries. They are aware that, amidst the rich variety of published thought on the rational basis of these fundamental legal institutions, many passages, equally suited for the purpose, may have been omitted. But, in view of the inexorable space-limits, and of the program which the book is intended to satisfy, they are convinced

that the readers of this volume will here find adequate materials for that clarification of thought and conviction which the Editors aim to stimulate.

To all the advisers, authors, and publishers who have so cordially coöperated with contributions, the Editors' appreciation is here thankfully offered.

J. H. W.
A. K.

INTRODUCTION

By Oliver Wendell Holmes

Law is a plant that lives long before it throws out bulbs. It is rooted for milleniums before it gathers the food and develops the nucleus for a new life that inquires into the reason for its being and for the directions and character of its growth. A book in which the leading institutions of the law are discussed in this way and defended or condemned by representatives of different sides hardly would have been possible until within the last hundred, perhaps the last fifty, years. But within that time it has become popular to believe that society advantageously may take its destiny into its own hands — may give a conscious direction to much that heretofore has rested on the assumption that the familiar is the best, or that has been left to the mechanically determined outcome of the coöperation and clash of private effort. We have seen even attempts to create a new and universal language. A first step toward such social control is to take an account of stock and to set a valuation upon what we have. To make a code that should do more than embody the unreasoned habits of the community it would be desirable in the beginning to determine our ideal — the remote but dominant end that we aim to reach — and then to consider whether one measure rather than another would help us toward it. I confess that I do not think that as yet we are very well prepared for wholesale reconstruction. But even if it never led to reconstruction it would gratify the noble instinct of scientific curiosity to understand why we maintain what now is.

[1] Justice, Supreme Court of the United States.

Since the time when I was in college embryology has taken the place of explanation, and even in the law a good deal of attention has been given to inquiring through what stages the law has come to its present form and content. But as law is human and can be altered the present inquiry is more important than any investigation of the past. We want reasons more than life history. At times the reader may feel disappointment — he may feel that, as in some fruits, there is a large constituent of water. But that is partly due to the fact that any idea that has been in the world for twenty years and has not perished has become a platitude although it was a revelation twenty years ago. One might also venture on the paradox that by the time that a proposition becomes generally articulate it ceases to be true — because things change about as fast as they are realized.

The present time is experimenting in negations — an amusing sport if it is remembered that while it takes but a few minutes to cut down a tree it takes a century for a tree to grow. Perhaps, however, more is to be apprehended from ungrounded hopes than from criticisms without a fulcrum. A very common mode of argument, made popular by the abolitionists, is to prophecy a change as bound to come and then to discount this promise for the future and to treat it as cash — as a present fact and a premise for further conclusions. Those who reason thus are more common and, I suspect, more dangerous than people who speak of the injustice of men being born with unequal faculties — criticising the order of the universe as if they were little gods outside it. The logic of the latter would seem to require that the cosmos should reduce itself to a single set of waves of equal length. We do not bother ourselves very much about them. But the optimists who are ready to make fundamental changes upon prophecies of the millenium to ensue may do real harm. When I am told that under this or that régime

selfishness would disappear, I cannot but reflect that my neighbor is better nourished by eating his own dinner than by my eating it for him, and I recall the tale of the men of Gotham who got hopelessly tangled up in their public meeting until a philosopher came by and said: Every man pull out his own legs. For the most part men believe what they want to. Humbugs through whose vitals Malthus ran a rapier a hundred years ago are alive and kicking to-day. But reason means truth and those who are not governed by it take the chances that some day the sunken fact will rip the bottom out of their boat.

The subjects dealt with in this book are so interesting that it is hard to refrain from expressing one's own views upon some of them at least. But in one place or another I have said what I think about the foundations, and I will go no farther than to repeat that most even of the enlightened reformers that I hear or read seem to me not to have considered with accuracy the means at our disposal and to become rhetorical just where I want figures. The notion that we can secure an economic paradise by changes in property alone seems to me twaddle. I can understand better legislation that aims rather to improve the quality than to increase the quantity of the population. I can understand saying, whatever the cost, so far as may be, we will keep certain strains out of our blood. If before the English factory acts the race was running down physically I can understand taking the economic risk of passing those acts — although they had to be paid for, and I do not doubt that in some way or other England was the worse for them, however favorable the balance of the account. I can understand a man's saying in any case, I want this or that and I am willing to pay the price, if he realizes what the price is. What I most fear is saying the same thing when those who say it do not know and have made no serious effort to find out what it will cost, as I think we in this country are rather inclined to do.

The passion for equality is now in fashion and Mr. Lester Ward has told us of the value of discontent. Without considering how far motives commonly classed as ignoble have covered themselves with a high sounding name, or how far discontent means inadequacy of temperament or will, the first step toward improvement is to look the facts in the face. To help us to do so is, I take it, the object of this book.

O. W. Holmes.

Washington, D. C., February, 1923.

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TITLE IA: INDIVIDUALISM AND STATE CONTROL IN GENERAL

CHAPTER I

FORMULA OF JUSTICE AND LIMITS OF STATE ACTION [1]

HUMAN JUSTICE

§ 12. Of man, as of all inferior creatures, the law by conformity to which the species is preserved, is that among adults the individuals best adapted to the conditions of their existence shall prosper most, and that individuals

[1] [By Herbert Spencer: born at Derby, England, April 27, 1820; died Dec. 8, 1903.

His works include: "Social Statics" (1850); "Over-Legislation" (1854); "The Principles of Psychology" (1855); "The Data of Psychology": part I (1869); "Essays" (1857–63–64–74); "Education: Intellectual, Moral, and Physical" (1861); "Classification of the Sciences" (1864); "Illustrations of Universal Progress" (1864); "The Study of Sociology" (1873); "Descriptive Sociology" (1874–82); "Progress: Its Law and Course" (1881); "The Philosophy of Style" (1882); "The Man versus The State" (1884); "The Factors of Organic Evolution" (1887); "A System of Synthetic Philosophy": vol. I: "First Principles" (1862); vols. II, III: "The Principles of Biology" (1863–67); vols. IV, V: "The Principles of Psychology" (1870–72); vols. VI, VII, VIII: "The Principles of Sociology" (1877–79–82–85); vols. IX, X: "The Principles of Morality" (1879–1893).

The selection above reprinted is from the author's "Justice" (1891) (in volume II of "The Principles of Morality"; also part IV of "The Principles of Ethics": N. Y., D. Appleton & Co., 1891) being pages 17–47 (parts omitted), 62–79 (parts omitted), and 212–259 (parts omitted).]

least adapted to the conditions of their existence shall prosper least — a law which, if uninterfered with, entails survival of the fittest, and spread of the most adapted varieties. And as before so here, we see that, ethically considered, this law implies that each individual ought to receive the benefits and the evils of his own nature and consequent conduct: neither being prevented from having whatever good his actions normally bring to him, nor allowed to shoulder off on to other persons whatever ill is brought to him by his actions. . . .

§ 14. More clearly in the human race than in lower races, we are shown that gregariousness establishes itself because it profits the variety in which it arises; partly by furthering general safety and partly by facilitating sustentation. And we are shown that the degree of gregariousness is determined by the degree in which it thus subserves the interests of the variety. . . .

The advantages of coöperation can be had only by conformity to certain requirements which association imposes. The mutual hindrances liable to arise during the pursuit of their ends by individuals living in proximity, must be kept within such limits as to leave a surplus of advantage obtained by associated life. . . .

The requirement that individual activities must be mutually restrained, which we saw is so felt among certain inferior gregarious creatures that they inflict punishments on those who do not duly restrain them, is a requirement which, more imperative among men, and more distinctly felt by them to be a requirement, causes a still more marked habit of inflicting punishments on offenders. . .

THE SENTIMENT OF JUSTICE

§ 16. Acceptance of the doctrine of organic evolution determines certain ethical conceptions. The doctrine implies that the numerous organs in each of the innumerable species of animals, have been either directly or in-

directly molded into fitness for the requirements of life by constant converse with those requirements. Simultaneously, through nervous modifications, there have been developments of the sensations, instincts, emotions, and intellectual aptitudes, needed for the appropriate uses of these organs. . . .

Here we shall assume it to be an inevitable inference from the doctrine of organic evolution, that the highest type of living being, no less than all lower types, must go on molding itself to those requirements which circumstances impose. And we shall, by implication, assume that moral changes are among the changes thus wrought out.

§ 17. By virtue of this process there have been produced to some extent among lower creatures, and there are being further produced in man, the sentiments appropriate to social life. Aggressive actions, while they are habitually injurious to the group in which they occur, are not unfrequently injurious to the individuals committing them; since, though certain pleasures may be gained by them, they often entail pains greater than the pleasures. Conversely, conduct restrained within the required limits, calling out no antagonistic passions, favors harmonious coöperation, profits the group, and, by implication, profits the average of its individuals. Consequently, there results, other things equal, a tendency for groups formed of members having this adaptation of nature, to survive and spread.

Among the social sentiments thus evolved, one of chief importance is the sentiment of justice. Let us now consider more closely its nature.

§ 18. Clearly, then, the egoistic sentiment of justice is a subjective attribute which answers to that objective requirement constituting justice — the requirement that each adult shall receive the results of his own nature and consequent actions. For unless the faculties of all kinds have

free play, these results cannot be gained or suffered, and unless there exists a sentiment which prompts maintenance of the sphere for this free play, it will be trenched upon and the free play impeded.

§ 19. While we may thus understand how the egoistic sentiment of justice is developed, it is much less easy to understand how there is developed the altruistic sentiment of justice. On the one hand, the implication is that the altruistic sentiment of justice can come into existence only in the course of adaptation to social life. On the other hand the implication is that social life is made possible only by maintenance of those equitable relations which imply the altruistic sentiment of justice. . . .

§ 20. Creatures which become gregarious tend to become sympathetic in degrees proportionate to their intelligences. Not, indeed, that the resulting sympathetic tendency is exclusively, or even mainly, of that kind which the words ordinarily imply; for in some there is little beyond sympathy in fear, and in others little beyond sympathy in ferocity. All that is meant is that in gregarious creatures a feeling displayed by one is apt to arouse kindred feelings in others, and is apt to do this in proportion as others are intelligent enough to appreciate the signs of the feeling. . . .

But the altruistic sentiment of justice is slow in assuming a high form, partly because its primary component does not become highly developed until a late phase of progress, partly because it is relatively complex, and partly because it implies a stretch of imagination not possible for low intelligences. Let us glance at each of these reasons.

Every altruistic feeling presupposes experience of the corresponding egoistic feeling. As, until pain has been felt there cannot be sympathy with pain, and as one who has no ear for music cannot enter into the pleasure which music gives to others; so, the altruistic sentiment of justice

can arise only after the egoistic sentiment of justice has arisen. Hence where this has not been developed in any considerable degree, or has been repressed by a social life of an adverse kind, the altruistic sentiment of justice remains rudimentary. . . .

§ 22. Already it has been made clear that the idea of justice, or at least the human idea of justice, contains two elements. On the one hand, there is that positive element implied by each man's recognition of his claims to unimpeded activities and the benefits they bring. On the other hand, there is that negative element implied by the consciousness of limits which the presence of other men having like claims necessitates. . . .

THE FORMULA OF JUSTICE

§ 27. After tracing up the evolution of justice in its simple form, considered objectively as a condition to the maintenance of life; after seeing how justice as so considered becomes qualified by a new factor when the life is gregarious, more especially in the human race; and after observing the corresponding subjective products — the sentiment of justice and the idea of justice — arising from converse with this condition; we are now prepared for giving to the conclusion reached a definite form. We have simply to find a precise expression for the compromise described. . . .

The formula has to unite a positive element with a negative element. It must be positive in so far as it asserts for each that, since he is to receive and suffer the good and evil results of his actions, he must be allowed to act. And it must be negative in so far as, by asserting this of everyone, it implies that each can be allowed to act only under the restraint imposed by the presence of others having like claims to act. Evidently the positive element is that which expresses a prerequisite to life in general, and the negative element is that which qualifies this prerequisite

in the way required when, instead of one life carried on alone, there are many lives carried on together.

Hence, that which we have to express in a precise way, is the liberty of each limited only by the like liberties of all. This we do by saying: — Every man is free to do that which he wills, provided he infringes not the equal freedom of any other man.

§ 28. A possible misapprehension must be guarded against. There are acts of aggression which the formula is presumably intended to exclude, which apparently it does not exclude. It may be said that if A strikes B, then, so long as B is not debarred from striking A in return, no greater freedom is claimed by the one than by the other; or it may be said that if A has trespassed on B's property, the requirement of the formula has not been broken so long as B can trespass on A's property. Such interpretations, however, mistake the essential meaning of the formula, which we at once see if we refer back to its origin. . . .

ITS COROLLARIES

§ 36. The statement that the liberty of each is bounded only by the like liberties of all, remains a dead letter until it is shown what are the restraints which arise under the various sets of circumstances he is exposed to.

Whoever admits that each man must have a certain restricted freedom, asserts that it is *right* he should have this restricted freedom. If it be shown to follow, now in this case and now in that, that he is free to act up to a certain limit but not beyond it, then the implied admission is that it is *right* he should have the particular freedom so defined. And hence the several particular freedoms deductible may fitly be called, as they commonly are called, his *rights*.

THE RIGHT TO PHYSICAL INTEGRITY

§ 39. It is a self-evident corollary from the law of equal freedom that, leaving other restraints out of consideration, each man's actions must be so restrained as not directly to inflict bodily injury, great or small, on any other. In the first place, actions carried beyond this limit imply the exercise on one side of greater freedom than is exercised on the other, unless it be by retaliation; and we have seen that, as rightly understood, the law does not countenance aggression and counter-aggression. In the second place, considered as the statement of a condition by conforming to which the greatest sum of happiness is to be obtained, the law forbids any act which inflicts physical pain or derangement.

§ 43. It remains only to say that while, in a system of absolute ethics, the corollary here drawn from the formula of justice is unqualified, in a system of relative ethics it has to be qualified by the necessities of social self-preservation. Already we have seen that the primary law that each individual shall receive and suffer the benefits and evils of his own nature, following from conduct carried on with due regard to socially-imposed limits, must, where the group is endangered by external enemies, be modified by the secondary law, which requires that there shall be such sacrifice of individuals as is required to preserve, for the aggregate of individuals, the ability thus to act and to receive the results of actions. . . .

THE RIGHTS TO FREE MOTION AND LOCOMOTION

§ 44. As direct deductions from the formula of justice, the right of each man to the use of unshackled limbs, and the right to move from place to place without hindrance, are almost too obvious to need specifying. Indeed these rights, more perhaps than any others, are immediately recognized in thought as corollaries. . . .

§ 48. But this dictum of absolute ethics has to be qualified by the requirements of relative ethics. From the principle laid down at the outset, that the preservation of the species, or that variety of it constituting a society, is an end which must take precedence of the preservation of the individual, it follows that the right to individual liberty, like the right to individual life, must be asserted subject to qualifications entailed by the measures needful for national safety.

DUTIES OF THE STATE

§ 116. And now what are these duties of the State considered under their most general aspect? What has a society in its corporate capacity to do for its members in their individual capacities? The answer may be given in several ways.

The prosperity of a species is best subserved when among adults each experiences the good and evil results of his own nature and consequent conduct. In a gregarious species fulfillment of this need implies that the individuals shall not so interfere with one another as to prevent the receipt by each of the benefits which his actions naturally bring to him, or transfer to others the evils which his actions naturally bring. This, which is the ultimate law of species life as qualified by social conditions, it is the business of the social aggregate, or incorporated body of citizens, to maintain. . . .

§ 120. What, then, becomes the duty of the society in its corporate capacity, that is, of the State? Assuming that it is no longer called on to guard against external dangers, what does there remain which it is called on to do? If the desideratum, alike for the individuals, for the society, and for the race, is that the individuals shall be such as can fulfill their several lives subject to the conditions named; then it is for the society in its corporate capacity to insist that these conditions shall be conformed to. Whether, in

the absence of war, a government has or has not anything more to do than this, it is clear it has to do this. And, by implication, it is clear that it is not permissible to do anything which hinders the doing of this.

Hence the question of limits becomes the question whether, beyond maintaining justice, the State can do anything else without transgressing justice. On consideration we shall find that it cannot.

§ 121. A man's liberties are none the less aggressed upon because those who coerce him do so in the belief that he will be benefited. In thus imposing by force their wills upon his will, they are breaking the law of equal freedom in his person; and what the motive may be matters not. Aggression which is flagitious when committed by one is not sanctified when committed by a host. . . .

§ 134. So that even if we disregard ethical restraints, and even if we ignore the inferences to be drawn from that progressing specialization which societies show us, we still find strong reasons for holding that State-functions should be restricted rather than extended.

Extension of them in pursuit of this or that promised benefit, has all along proved disastrous. The histories of all nations are alike in exhibiting the enormous evils that have been produced by legislation guided merely by "the merits of the case"; while they unite in proving the success of legislation which has been guided by considerations of equity. . . .

§ 140. The organic world at large is made up of illustrations, infinite in number and variety, of the truth that by direct or indirect processes the faculties of each kind of creature become adjusted to the needs of its life; and further, that the exercise of each adjusted faculty becomes a source of gratification. In the normal order not only does there arise an agent for each duty, but consciousness is made up of the more or less pleasurable feelings which accompany the exercise of these agents. Further, the

implication is that where the harmony has been deranged, it gradually reëstablishes itself — that where change of circumstances has put the powers and requirements out of agreement, they slowly, either by survival of the fittest or by the inherited effects of use and disuse, or by both, come into agreement again.

This law, holding of human beings among others, implies that the nature which we inherit from an uncivilized past, and which is still very imperfectly fitted to the partially-civilized present, will, if allowed to do so, slowly adjust itself to the requirements of a fully-civilized future. And a further implication is that the various faculties, tastes, abilities, gradually established, will have for their concomitants the satisfactions felt in discharging the various duties social life entails. Already there has been gained a considerable amount of the needful capacity for work, which savages have not; already the power of orderly coöperation under voluntary agreement has been developed; already such amounts of self-restraint have been acquired that most men carry on their lives without much impeding one another; already the altruistic interests felt by citizens in social affairs at large are such as prompt efforts, individual and spontaneously combined, to achieve public ends. And if, in the course of these few thousand years, the discipline of social life has done so much, it is folly to suppose that it cannot do more — folly to suppose that it will not in course of time do all that has to be done.

A further truth remains. It is impossible for artificial molding to do that which natural molding does. For the very essence of the process, as spontaneously carried on, is that each faculty acquires fitness for its function by performing its function; and if its function is performed for it by a substituted agency, none of the required adjustment of nature takes place; but the nature becomes deformed to fit the artificial arrangements instead of the natural arrangements. More than this: it has to be de-

pleted and dwarfed, for the support of the substituted agencies. Not only does there result the incapable nature, the distorted nature, and the nature which misses the gratifications of desired achievement; but that the superintending instrumentalities may be sustained, the sustentation of those who are superintended is diminished: their lives are undermined and their adaptation in another way impeded.

Again, then, let me emphasize the fundamental distinction. While war is the business of life, the entailed compulsory coöperation implies molding of the units by the aggregate to serve its purposes; but when there comes to predominate the voluntary coöperation characterizing industrialism, the molding has to be spontaneously achieved by self-adjustment to the life of voluntary coöperation. The adjustment cannot possibly be otherwise produced.

CHAPTER II

UTILITARIAN BASIS OF INDIVIDUALISM[1]

[1.] In political and philosophical theories, as well as in persons, success discloses faults and infirmities which failure might have concealed from observation. The notion that the people have no need to limit their power over themselves, might seem axiomatic, when popular government was a thing only dreamed about, or read of as having existed at some distant period of the past. Neither was that notion necessarily disturbed by such temporary aberrations as those of the French Revolution, the worst of which were the work of an usurping few, and which, in any case, belonged, not to the permanent working of popular institutions, but to a sudden and convulsive outbreak against monarchical and aristocratic despotism. In time, however, a democratic republic came to occupy a large portion of the earth's surface, and made itself felt as one of the most powerful members of the community of nations; and elective and responsible government

[1] [By JOHN STUART MILL: born at London, England, May 20, 1806; died at Avignon, France, May 8, 1873.

His works include Buchanan's "Treatise on Evidence" (edited by Mill) (1825); "Essays on Unsettled Questions of Political Economy" (1844); "Logic" (1843); "Political Economy" (1848); "Essay on Liberty" (1859); "On the Subjection of Women" (1869); "Thoughts on Parliamentary Reform" (1859); "Dissertations and Discussions" (1859–67); "Considerations on Representative Government" (1861); "Utilitarianism" (1862); "Examination of Sir William Hamilton's Philosophy" (1865); "August Comte and Positivism" (1865); "England and Ireland" (1868); "On the Irish Land Question" (1870); "Nature, the Utility of Religion, and Theism" (1874); "Autobiography" (1873).

The selection above reprinted is from his essay "On Liberty" (reprinted in Collier's Harvard Classics), pages 202–6, 212, 214–15, 256, 260–61, 271–72, 281–82, 294–97, 302–6, 311–13, 318–23.]

became subject to the observations and criticisms which wait upon a great existing fact. It was now perceived that such phrases as "self-government," and "the power of the people over themselves," do not express the true state of the case. The "people" who exercise the power are not always the same people with those over whom it it exercised; and the "self-government" spoken of is not the government of each by himself, but of each by all the rest. The will of the people, moreover, practically means the will of the most numerous or the most active *part* of the people; the majority, or those who succeed in making themselves accepted as the majority; the people, consequently, *may* desire to oppress a part of their number; and precautions are as much needed against this as against any other abuse of power. The limitation, therefore, of the power of government over individuals loses none of its importance when the holders of power are regularly accountable to the community, that is, to the strongest party therein. . . .

[2.] The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is *self-protection*. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to *prevent harm to others*. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning

with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign. . . .

[3.] As it is useful that while mankind are imperfect there should be different opinions, so it is that there should be different experiments of living; that free scope should be given to varieties of character, short of injury to others; and that the worth of different modes of life should be proved practically, when any one thinks fit to try them. It is desirable, in short, that in things which do not primarily concern others, individuality should assert itself. . . .

In maintaining this principle, the greatest difficulty to be encountered does not lie in the appreciation of means towards an acknowledged end, but in the indifference of persons in general to the end itself. If it were felt that the free development of individuality is one of the leading essentials of well-being; that it is not only a coördinate element with all that is designated by the terms civilization, instruction, education, culture, but is itself a necessary part and condition of all those things; there would be no danger that liberty should be undervalued, and the adjustment of the boundaries between it and social control would present no extraordinary difficulty. But the evil is, that individual spontaneity is hardly recognized by the common modes of thinking, as having any intrinsic worth, or deserving any regard on its own account. The majority, being satisfied with the ways of mankind as they now are (for it is they who make them what they are), cannot comprehend why those ways should not be good enough for everybody; and what is more, sponta-

neity forms no part of the ideal of the majority of moral and social reformers, but is rather looked on with jealousy, as a troublesome and perhaps rebellious obstruction to the general acceptance of what these reformers, in their own judgment, think would be best for mankind. . . .

It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it, and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation; and as the works partake the character of those who do them, by the same process human life also becomes rich, diversified, and animating, furnishing more abundant aliment to high thoughts and elevating feelings, and strengthening the tie which binds every individual to the race, by making the race infinitely better worth belonging to. In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others. There is a greater fulness of life about his own existence, and when there is more life in the units there is more in the mass which is composed of them. Whatever crushes individuality is despotism, by whatever name it may be called, and whether it professes to be enforcing the will of God or the injunctions of men.

[4.] Having said that Individuality is the same thing with development, and that it is only the cultivation of individuality which produces, or can produce, well-developed human beings, I might here close the argument: for what more or better can be said of any condition of human affairs, than that. Doubtless, however, these considerations will not suffice to convince those who most need convincing; and it is necessary further to show, that these developed human beings are of some use to the undeveloped — to point out to those who do not desire liberty, and would not avail themselves of it, that they

may be in some intelligible manner rewarded for allowing other people to make use of it without hindrance.

In the first place, then, I would suggest that they might possibly learn something from them. It will not be denied by anybody, that originality is a valuable element in human affairs. There is always need of persons not only to discover new truths, and point out when what were once truths are true no longer, but also to commence new practices, and set the example of more enlightened conduct, and better taste and sense in human life. It is true that this benefit is not capable of being rendered by everybody alike: there are but few persons, in comparison with the whole of mankind, whose experiments, if adopted by others, would be likely to be any improvement on established practice. But these few are the salt of the earth; without them, human life would become a stagnant pool. Not only is it they who introduce good things which did not before exist; it is they who keep the life in those which already exist. Persons of genius, it is true, are, and are always likely to be, a small minority; but in order to have them, it is necessary to preserve the soil in which they grow. Genius can only breathe freely in an *atmosphere* of freedom. . . .

In sober truth, whatever homage may be professed, or even paid, to real or supposed mental superiority, the general tendency of things throughout the world is to render mediocrity the ascendant power among mankind. In ancient history, in the Middle Ages, and in a diminishing degree through the long transition from feudality to the present time, the individual was a power in himself; and if he had either great talents or a high social position, he was a considerable power. At present individuals are lost in the crowd. In politics it is almost a triviality to say that public opinion now rules the world. The only power deserving the name is that of masses, and of governments while they make themselves the organ of the

tendencies and instincts of masses. This is as true in the moral and social relations of private life as in public transactions. Those whose opinions go by the name of public opinion, are not always the same sort of public. But they are always a mass, that is to say, collective mediocrity. And what is a still greater novelty, the mass do not now take their opinions from dignitaries in Church or State, from ostensible leaders, or from books. Their thinking is done for them by men much like themselves, addressing them or speaking in their name, on the spur of the moment, through the newspapers. I am not complaining of all this. I do not assert that anything better is compatible, as a general rule, with the present low state of the human mind. But that does not hinder the government of mediocrity from being mediocre government. No government by a democracy or a numerous aristocracy, either in its political acts or in the opinions, qualities, and tone of mind which it fosters, ever did or could rise above mediocrity, except in so far as the sovereign Many have let themselves be guided (which in their best times they always have done) by the counsels and influence of a more highly gifted and instructed One or Few. The initiation of all wise or noble things comes and must come from individuals; generally at first from some one individual. The honor and glory of the average man is that he is capable of following that initiative; that he can respond internally to wise and noble things, and be led to them with his eyes open. . . .

[5.] But independence of action, and disregard of custom, are not solely deserving of encouragement for the chance they afford that better modes of action, and customs more worthy of general adoption, may be struck out; nor is it only persons of decided mental superiority who have a just claim to carry on their lives in their own way. There is no reason that all human existence should be constructed on some one or some small number of pat-

terns. If a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode. Human beings are not like sheep; and even sheep are not undistinguishably alike. A man cannot get a coat or a pair of boots to fit him, unless they are either made to his measure, or he has a whole warehouseful to choose from: and is it easier to fit him with a life than with a coat, or are human beings more like one another in their whole physical and spiritual conformation than in the shape of their feet? If it were only that people have diversities of taste, that is reason enough for not attempting to shape them all after one model. But different persons also require different conditions for their spiritual development; and can no more exist healthily in the same moral, than all the variety of plants can in the same physical, atmosphere and climate. Why then should tolerance, as far as the public sentiment is concerned, extend only to tastes and modes of life which extort acquiescence by the multitude of their adherents? Nowhere (except in some monastic institutions) is diversity of taste entirely unrecognized; a person may, without blame, either like or dislike rowing, or smoking, or music, or athletic exercises, or chess, or cards, or study, because both those who like each of these things, and those who dislike them, are too numerous to be put down. But the man, and still more the woman, who can be accused either of doing "what nobody does," or of not doing "what everybody does," is the subject of as much depreciatory remark as if he or she had committed some grave moral delinquency. . . .

The despotism of custom is everywhere the standing hindrance to human advancement, being in unceasing antagonism to that disposition to aim at something better than customary, which is called, according to circumstances, the spirit of liberty, or that of progress or improve-

ment. The greater part of the world has, properly speaking, no history, because the despotism of Custom is complete. This is the case over the whole East. Custom is there, in all things, the final appeal; justice and right mean conformity to custom; the argument of custom no one, unless some tyrant intoxicated with power, thinks of resisting. And we see the result. Those nations must once have had originality; they did not start out of the ground populous, lettered, and versed in many of the arts of life; they made themselves all this, and were then the greatest and most powerful nations of the world. What are they now? The subjects or dependents of tribes whose forefathers wandered in the forests when theirs had magnificent palaces and gorgeous temples, but over whom custom exercised only a divided rule with liberty and progress. A people, it appears, may be progressive for a certain length of time, and then stop: when does it stop? When it ceases to possess individuality. . . .

The combination of all these causes forms so great a mass of influences hostile to Individuality, that it is not easy to see how it can stand its ground. It will do so with increasing difficulty, unless the intelligent part of the public can be made to feel its value — to see that it is good there should be differences, even though not for the better, even though, as it may appear to them, some should be for the worse. . . .

[6.] What, then, is the rightful limit to the sovereignty of the individual over himself? Where does the authority of society begin? How much of human life should be assigned to individuality, and how much to society?

Each will receive its proper share, if each has that which more particularly concerns it. To individuality should belong the part of life in which it is chiefly the individual that is interested; to society, the part which chiefly interests society.

Though society is not founded on a contract, and though

no good purpose is answered by inventing a contract in order to deduce social obligations from it, every one who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest. This conduct consists, first, in not injuring the interests of one another; or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights; and secondly, in each person's bearing his share (to be fixed on some equitable principle) of the labors and sacrifices incurred for defending the society or its members from injury and molestation. These conditions society is justified in enforcing, at all costs to those who endeavor to withhold fulfilment. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like (all the persons concerned being of full age, and the ordinary amount of understanding). In all such cases, there should be perfect freedom, legal and social, to do the action and stand the consequences.

[7.] The distinction here pointed out between the part of a person's life which concerns only himself, and that which concerns others, many persons will refuse to admit. How (it may be asked) can any part of the conduct of a member of society be a matter of indifference to the other members? No person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself, without mischief reaching at least to his near connections, and often far beyond them. If he injures his property, he does harm to those who directly or indirectly derived support from it, and usually diminishes, by a greater or less amount, the general resources of the community. If he deteriorates his bodily

or mental faculties, he not only brings evil upon all who depended on him for any portion of their happiness, but disqualifies himself for rendering the services which he owes to his fellow creatures generally; perhaps becomes a burden on their affection or benevolence; and if such conduct were very frequent, hardly any offense that is committed would detract more from the general sum of good. Finally, if by his vices or follies a person does no direct harm to others, he is nevertheless (it may be said) injurious by his example; and ought to be compelled to control himself, for the sake of those whom the sight or knowledge of his conduct might corrupt or mislead. . . .

I fully admit that the mischief which a person does to himself may seriously affect, both through their sympathies and their interests, those nearly connected with him, and in a minor degree, society at large. When, by conduct of this sort, a person is led to violate a distinct and assignable obligation to any other person or persons, the case is taken out of the self-regarding class, and becomes amenable to moral disapprobation in the proper sense of the term. If, for example, a man, through intemperance or extravagance, becomes unable to pay his debts, or, having undertaken the moral responsibility of a family, becomes from the same cause incapable of supporting or educating them, he is deservedly reprobated, and might be justly punished; but it is for the breach of duty to his family or creditors, not for the extravagance. If the resources which ought to have been devoted to them had been diverted from them for the most prudent investment, the moral culpability would have been the same. George Barnwell murdered his uncle to get money for his mistress, but if he had done it to set himself up in business, he would equally have been hanged. . . .

But with regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific

duty to the public, nor occasions perceptible hurt to any assignable individual except himself; the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom. . . .

[8.] But the strongest of all the arguments against the interference of the public with purely personal conduct, is that when it does interfere, the odds are that it interferes wrongly, and in the wrong place. On questions of social morality, of duty to others, the opinion of the public, that is, of an overruling majority, though often wrong, is likely to be still oftener right; because on such questions they are only required to judge of their own interests; of the manner in which some mode of conduct, if allowed to be practiced, would affect themselves. But the opinion of a similar majority, imposed as a law on the minority, on questions of self-regarding conduct, is quite as likely to be wrong as right. It is easy for any one to imagine an ideal public, which leaves the freedom and choice of individuals in all uncertain matters undisturbed, and only requires them to abstain from modes of conduct which universal experience has condemned. But where has there been seen a public which set any such limit to its censorship? or when does the public trouble itself about universal experience? In its interferences with personal conduct it is seldom thinking of anything but the enormity of acting or feeling differently from itself; and this standard of judgment, thinly disguised, is held up to mankind as the dictate of religion and philosophy, by nine tenths of all moralists and speculative writers. These teach that things are right because they are right; because we feel them to be so. . . .

The few observations I propose to make on questions of detail, are designed to illustrate the principles, rather than to follow them out to their consequences. I offer, not so much applications, as specimens of application; which may serve to bring into greater clearness the mean-

ing and limits of the two maxims which together form the entire doctrine of this Essay, and to assist the judgment in holding the balance between them, in the cases where it appears doubtful which of them is applicable to the case.

The maxims are, first, that the individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself. Advice, instruction, persuasion, and avoidance by other people if thought necessary by them for their own good, are the only measures by which society can justifiably express its dislike or disapprobation of his conduct. Secondly, that for such actions as are prejudicial to the interests of others, the individual is accountable, and may be subjected either to social or to legal punishment, if society is of opinion that the one or the other is requisite for its protection. . . .

[9.] One of these examples, that of the sale of poisons, opens a new question; the proper limits of what may be called the functions of police; how far liberty may legitimately be invaded for the prevention of crime, or of accident. It is one of the undisputed functions of government to take precautions against crime before it has been committed, as well as to detect and punish it afterwards. The preventive function of government, however, is far more liable to be abused, to the prejudice of liberty, than the punitory function; for there is hardly any part of the legitimate freedom of action of a human being which would not admit of being represented, and fairly too, as increasing the facilities for some form or other of delinquency. Nevertheless, if a public authority, or even a private person, sees any one evidently preparing to commit a crime, they are not bound to look on inactive until the crime is committed, but may interfere to prevent it. If poisons were never bought or used for any purpose except the commission of murder, it would be right to prohibit their manufacture and sale. They may, however, be wanted not only for innocent but for useful purposes,

and restrictions cannot be imposed in the one case without operating in the other. Such a precaution, for example, as that of labeling the drug with some word expressive of its dangerous character, may be enforced without violation of liberty: the buyer cannot wish not to know that the thing he possesses has poisonous qualities. But to require in all cases the certificate of a medical practitioner, would make it sometimes impossible, always expensive, to obtain the article for legitimate uses. The only mode apparent to me, in which difficulties may be thrown in the way of crime committed through this means, without any infringement worth taking into account, upon the liberty of those who desire the poisonous substance for other purposes, consists in providing what, in the apt language of Bentham, is called "preappointed evidence." This provision is familiar to every one in the case of contracts. It is usual and right that the law, when a contract is entered into, should require as the condition of its enforcing performance, that certain formalities should be observed, such as signatures, attestation of witnesses, and the like, in order that in case of subsequent dispute, there may be evidence to prove that the contract was really entered into, and that there was nothing in the circumstances to render it legally invalid: the effect being to throw great obstacles in the way of fictitious contracts or contracts made in circumstances which, if known, would destroy their validity. Precautions of a similar nature might be enforced in the sale of articles adapted to be instruments of crime. The seller, for example, might be required to enter in a register the exact time of the transaction, the name and address of the buyer, the precise quality and quantity sold; to ask the purpose for which it was wanted, and record the answer he received. When there was no medical prescription, the presence of some third person might be required, to bring home the fact to the purchaser, in case there should afterwards be reason

to believe that the article had been applied to criminal purposes. Such regulations would in general be no material impediment to obtaining the article, but a very considerable one to making an improper use of it without detection.

[10.] The right inherent in society, to ward off crimes against itself by antecedent precautions, suggests the obvious limitations to the maxim, that purely self-regarding misconduct cannot properly be meddled with in the way of prevention or punishment. Drunkenness, for example, in ordinary cases, is not a fit subject for legislative interference; but I should deem it perfectly legitimate that a person, who had once been convicted of any act of violence to others under the influence of drink, should be placed under a special legal restriction, personal to himself; that if he were afterwards found drunk, he should be liable to a penalty, and that if when in that state he committed another offense, the punishment to which he would be liable for that other offense should be increased in severity. The making himself drunk, in a person whom drunkenness excites to do harm to others, is a crime against others. So, again, idleness, except in a person receiving support from the public, or except when it constitutes a breach of contract, cannot without tyranny be made a subject of legal punishment; but if, either from idleness or from any other avoidable cause, a man fails to perform his legal duties to others, as for instance to support his children, it is no tyranny to force him to fulfill that obligation, by compulsory labor, if no other means are available.

[11.] I have reserved for the last place a large class of questions respecting the limits of government interference, which, though closely connected with the subject of this Essay, do not, in strictness, belong to it. These are cases in which the reasons against interference do not turn upon the principle of liberty: the question is not about restrain-

ing the actions of individuals, but about helping them: it is asked whether the government should do, or cause to be done, something for their benefit, instead of leaving it to be done by themselves, individually or in voluntary combination.

The obligations to government interference, when it is not such as to involve infringement of liberty, may be of three kinds.

The first is, when the thing to be done is likely to be better done by individuals than by the government. Speaking generally, there is no one so fit to conduct any business, or to determine how or by whom it shall be conducted, as those who are personally interested in it. This principle condemns the interferences, once so common, of the legislature, or the officers of government, with the ordinary processes of industry. . . .

The second objection is more nearly allied to our subject. In many cases, though individuals may not do the particular thing so well, on the average, as the officers of government, it is nevertheless desirable that it should be done by them, rather than by the government, as a means to their own mental education — a mode of strengthening their active faculties, exercising their judgment, and giving them a familiar knowledge of the subjects with which they are thus left to deal. This is a principal, though not the sole, recommendation of jury trial (in cases not political); of free and popular local and municipal institutions; of the conduct of industrial and philanthropic enterprises by voluntary associations. These are not questions of liberty, and are connected with that subject only by remote tendencies; but they are questions of development. . . .

The third, and most cogent reason for restricting the interference of government, is the great evil of adding unnecessarily to its power. Every function superadded to those already exercised by the government, causes its

influence over hopes and fears to be more widely diffused, and converts, more and more, the active and ambitious part of the public into hangers-on of the government, or of some party which aims at becoming the government. If the roads, the railways, the banks, the insurance offices, the great joint-stock companies, the universities, and the public charities, were all of them branches of the government; if, in addition, the municipal corporations and local boards, with all that now devolves on them, became departments of the central administration; if the employees of all these different enterprises were appointed and paid by the government, and looked to the government for every rise in life; not all the freedom of the press and popular constitution of the legislature would make this or any other country free otherwise than in name. And the evil would be greater, the more efficiently and scientifically the administrative machinery was constructed — the more skillful the arrangements for obtaining the best qualified hands and heads with which to work it. If indeed all the high talent of the country *could* be drawn into the service of the governments, a proposal tending to bring about that result might well inspire uneasiness. If every part of the business of society which required organized concert, or large and comprehensive views, were in the hands of the government, and if government offices were universally filled by the ablest men, all the enlarged culture and practiced intelligence in the country, except the purely speculative, would be concentrated in a numerous bureaucracy, to whom alone the rest of the community would look for all things: the multitude for direction and dictation in all they had to do; the able and aspiring for personal advancement. To be admitted into the ranks of this bureaucracy, and when admitted, to rise therein, would be the sole objects of ambition. Under this régime, not only is the outside public ill-qualified, for want of practical experience, to criticise or check the mode

of operation of the bureaucracy, but even if the accidents of despotic or the natural working of popular institutions occasionally raise to the summit a ruler or rulers of reforming inclinations, no reform can be effected which is contrary to the interest of the bureaucracy. Such is the melancholy condition of the Russian empire, as shown in the accounts of those who have had sufficient opportunity of observation. The Czar himself is powerless against the bureaucratic body; he can send any one of them to Siberia, but he cannot govern without them, or against their will. On every decree of his they have a tacit veto, by merely refraining from carrying it into effect. In countries of more advanced civilization and of a more insurrectionary spirit, the public, accustomed to expect everything to be done for them by the State, or at least to do nothing for themselves without asking from the State not only leave to do it, but even how it is to be done, naturally hold the State responsible for all evil which befalls them, and when the evil exceeds their amount of patience, they rise against the government, and make what is called a revolution; whereupon somebody else, with or without legitimate authority from the nation, vaults into the seat, issues his orders to the bureaucracy, and everything goes on much as it did before; the bureaucracy being unchanged, and nobody else being capable of taking their place. . . .

But where everything is done through the bureaucracy, nothing to which the bureaucracy is really adverse can be done at all. The constitution of such countries is an organization of the experience and practical ability of the nation, into a disciplined body for the purpose of governing the rest; and the more perfect that organization is in itself, the more successful in drawing to itself and educating for itself the persons of greatest capacity from all ranks of the community, the more complete is the bondage of all, the members of the bureaucracy included. . . .

It is not, also, to be forgotten, that the absorption of all the principal ability of the country into the governing body is fatal, sooner or later, to the mental activity and progressiveness of the body itself. Banded together as they are — working a system which, like all systems, necessarily proceeds in a great measure by fixed rules — the official body are under the constant temptation of sinking into indolent routine, or, if they now and then desert that mill-horse round, of rushing into some half-examined crudity which has struck the fancy of some leading member of the corps: and the sole check to these closely allied, though seemingly opposite, tendencies, the only stimulus which can keep the ability of the body itself up to a high standard, is liability to the watchful criticism of equal ability outside the body. It is indispensable, therefore, that the means should exist, independently of the government, of forming such ability, and furnishing it with the opportunities and experience necessary for a correct judgment of great practical affairs. If we would possess permanently a skillful and efficient body of functionaries — above all, a body able to originate and willing to adopt improvements; if we would not have our bureaucracy degenerate into a pedantocracy, this body must not engross all the occupations which form and cultivate the faculties required for the government of mankind. . .

CHAPTER III

INDIVIDUALISTIC MINIMUM OF GOVERNMENT INTERFERENCE [1]

§ 1. We have now examined briefly the chief heads of what may be called the "individualistic minimum" of primary governmental interference so far as sane adults alone are concerned: viz. (1) the Right of personal security, including security to health and reputation, (2) the Right of private property, together with the Right of freely transferring property by gift, sale, or bequest, and (3) the Right to fulfillment of contracts freely entered into. We have found, under each head, that — speaking broadly — the kind of legislation which modern states agree to adopt, and practical persons agree to recommend, is not capable of being justified on the principle of taking Freedom — in any ordinary sense of the term — as an absolute end. It requires for its justification an individualistic maxim definitely understood as a subordinate principle or "middle axiom" of utilitarianism: *i.e.* that individuals are to be protected from deception, breach of engagements, annoyance, coercion, or other conduct tending to impede them in the pursuit of their ends, so far as such protection seems to be conducive to the general happiness. This

[1] [By Henry Sidgwick: born at Skipton, Yorkshire, England, May 31, 1838; died Oct. 28, 1900. He was educated at Rugby and at Trinity College, Cambridge. He became Professor of Moral Philosophy at Cambridge in 1883.

His works include: "Methods of Ethics" (1874); "Principles of Political Economy" (1883); "Outlines of the History of Ethics" (1886); "Elements of Politics" (Macmillan Co., 1891).

The selection above reprinted is from chapters IV and IX of the "Elements of Politics."]

conclusion will guide our subsequent attempt to work out in more detail the conception of the "individualistic minimum." . . .

§ 2. The last-mentioned case brings us up to the disputed margin of what I have called the "individualistic minimum" of governmental interference. The prevention of deception by sellers, in respect of the quantity of the wares purchased, is obviously much facilitated by the prescription of standard weights and measures: and similarly in many other cases the easiest and most effective way of preventing harm is to prescribe certain *precautions* against it — *i.e.* to prohibit acts or omissions not directly or necessarily mischievous to others, but attended with a certain risk of mischief. Here, however, we have come to an extension of governmental interference, in the way of regulation — involving a similar extension in the way of inspection [1] — the legitimacy of which has been in some cases seriously disputed by individualists. . . .

Now this kind of indirectly individualistic interference can hardly be argued to be generally inadmissible, on our utilitarian interpretation of the fundamental principle of Individualism. . . .

§ 3. Here, however, it has to be observed that in dealing with these and similar concrete examples of what I have characterized as "indirectly individualistic interference," we see that it is very difficult to distinguish it in practice from the kind that I have called "paternal." Abstractly considered, the question (1) "How far Government may legitimately go in preventing acts or omissions that are not directly or necessarily harmful, on the ground that there is risk of their causing mischief indirectly to persons, other than the agent, who have not consented to run the risk," is quite distinct from the question (2) "How

[1] So far as such regulations are applied to processes carried on otherwise than in public, it will be necessary, in order to secure their observance, that Government inspectors have the power of entering private grounds and buildings.

far Government ought to interfere to prevent mischief caused to an individual by himself or with his own consent." But in concrete cases the two questions are almost always mixed up, since, where a man's acts or neglects tend to harm himself so seriously as to suggest a need of Governmental interference to prevent the mischief, they usually tend also to harm others.[1] An illustration of this may be found in the sanitary regulations enforced by our own legislation. When a man is forced to coöperate with his fellow-citizens in a common system of drainage and water-supply, when he is prevented from using a house unfit for human habitation, or from over-crowding any part of a house, it may be said that coercion is applied to him in his own interest: and no doubt it is designed that he should derive benefit from the coercion; still its main justification lies in the need of protecting his children and neighbors who might suffer if his house became a focus of disease. Similarly, few individualists are so extreme as to deny that the tendency of drunkenness to cause breaches of the peace is a legitimate ground for *some* interference with the trade of selling alcohol: and the most thoroughgoing abolitionist usually urges restriction more as indirectly individualistic than as paternal — *i.e.* more on the ground of the proved tendency of alcoholic excess to make a man beat his wife and starve his children, than on the ground of its tendency to injure the drunkard himself.

So again, where an individual would evidently cause danger to the physical wellbeing or the property of others by not taking precautions to protect his own person or property from certain external sources of mischief, — as in the case of protection of land from floods, or of men or

[1] I do not here take into account the tendency of a man who harms himself to harm others by bad example. For interference to protect men from the mischief of bad example is clearly "paternal": since if we assume them adequately capable of looking after their own interests, we must assume that bad example will be on the whole deterrent rather than attractive.

useful animals from infectious diseases, — it is, I conceive, a simple application of the individualistic principle to make him responsible, after warning, for the injury that his neglect may cause to others: and if so, when this injury is likely to be, in kind or amount, such as he could not adequately compensate, it is an obvious and not unreasonable extension of the principle to compel him to coöperate with others in a general system of precautions. And though the benefit of such compulsion may be primarily received by himself, still since the decisive ground for adopting it is the prevention of mischief to others, it is not properly to be regarded as "paternal" interference, — in the special sense in which I have adopted this term. Similar reasoning is applicable to the provision of means for *reducing* mischief caused by accident or neglect, when such mischief is liable to spread: as in the case of fires in towns.[1]

Other interferences that may seem *prima facie* "paternal" in their aims admit of being regarded, at least in part, as merely an extension of that protection against deception which the individualistic principle has always been held to cover. For instance, when our Government endeavors to prevent its subject from employing improperly qualified physicians, apothecaries, and pilots; or from buying meat known to be diseased; or from taking part in dangerous industrial processes — as (*e.g.*) mining and navigation — without due precautions, it may be said that it aims merely at protecting its subjects from evils incurred through ignorance of which other persons take advantage. And a similar view may also be taken of another important class of cases in which the mischief sought to be prevented is pecuniary loss. Thus, it may be said that the prohibition of "truck" (that is, of the pay-

[1] Even so decided an advocate of *Laisser Faire* as M. Paul Leroy-Beaulieu considers that the "pompiers volontaires qui l'on voit encore a Londres" perform a function that had better be organized by government. *Revue des deux Mondes*, 1888, iv. p. 931.

ment of wages otherwise than in money) is "indirectly individualistic" and not "paternal"; since its design is merely to secure to laborers the amount of real wages that is by contract fairly due to them, by preventing the diminution of such real wages through the supply of goods of inferior quality, at a price above their market value.

The truth is — as the discussion of the conditions of valid contracts showed us — that it is a task of some delicacy to define the individualistic principle, in relation to deception, with the exactness required for practical application. When it is affirmed that an "individual should be left to take care of his own interests," some proviso is always understood with regard to his protection against imposture: but the precise nature of the proviso is left somewhat obscure; and it may be plausibly extended to prohibit any man from knowingly profiting by the ignorance of another. And if we go as far as this, it may be plausibly urged that it is desirable, when possible, to go further, and prevent A from profiting by the manifest ignorance of B, even when it is shared by A; especially considering the great difficulty of ascertaining whether or not an impostor is self-deceived. But when we have come to this point, the line between individualistic and paternal interference will have practically vanished. And even the rule that no one may *knowingly* profit by the ignorance of another, if consistently applied to commercial dealings, would carry us far beyond what any individualist has ventured practically to recommend; and — if it could ever be effectually carried out — would seriously impair the stimulus to the acquisition of useful knowledge on which individualism relies.

On the whole, therefore, I think that we must interpret the proviso above mentioned as merely prohibiting a man from profiting by ignorance or error that he has contributed, intentionally or negligently, to produce: and it is on this view that I should define the limits, in the

cases above mentioned, of directly individualistic interference. To prevent the flesh of diseased animals from being disguised as the flesh of healthy animals; to prevent would-be surgeons or apothecaries from pretending to have obtained certificates of qualification which they have not really obtained; to oblige employers who may have contracted to pay wages in goods to supply such goods in strict accordance with contract as regards quality and price; — all this is clearly and directly individualistic: on the other hand, if Government absolutely prohibits the purchase of food it deems unhealthy, the consultation of physicians it deems unqualified, the adoption of methods of payment it deems unfit, its action is certainly what I have called "paternal." But in many of these cases it is possible for Government to do more than prevent deception, without incurring the chief objections to "paternal" intervention: it may take measures to remove the ignorance of consumers as to the dangerous qualities of commodities offered for purchase, — or the ignorance of laborers as to the dangerous nature of instruments which their employers require them to use, — without compelling any one to act on the information thus supplied. And such a procedure is, in my view, within the limits of the "indirectly individualistic" intervention of Government discussed in this chapter; since its aim is to protect individuals from mischief caused by the action of others, the risk of which — as they are supposed not to know it — they cannot be said to have consented to run. We may assume that the great majority of persons do not wish to shoot with gun-barrels that are liable to burst, or to consume condiments rendered attractive by poisonous coloring matter:[1] and if the dangerous quality of these and other commodities can only be known by technical skill, the coercion involved in raising by taxation the required funds, to provide for the examination by experts

[1] See Jevons, "The State in Relation to Labour," chap. II.

of such commodities before they are sold, is but a slight price to pay for the consequent protection against mischief. The consumer might still be left free to buy unsafe guns or poisonous pickles if he chose. Similarly, unseaworthy ships and unnecessarily dangerous machinery might be examined and reported on by governmental experts, without any positive prohibition of their use, in case persons were found to run the risk of using them in spite of full and clear warning.

§ 4. In what I have said above I do not mean to imply that all governmental interference which is undeniably "paternal" ought therefore to be rejected without further inquiry. I consider that so uncompromising an adhesion to the principle "that men are the best guardians of their own welfare" is not rationally justified by the evidence on which the principle rests. I regard this principle as a rough induction from our ordinary experience of human life; as supported on an empirical basis sufficiently strong and wide to throw the *onus probandi* heavily on those who advocate any deviation from it, but in no way proved to be an even approximately universal truth. Hence, if strong empirical grounds are brought forward for admitting a particular practical exception to this principle — if, *e.g.*, it is proved that men are largely liable to ruin themselves by gambling or opium-smoking, or knowingly to incur easily avoided dangers in industrial processes — it would, I think, be unreasonable to allow these practices to go on without interference, merely on account of the established general presumption in favor of *laisser faire*.[1] The particular cases in which such "paternal" intervention is on the whole desirable must be determined by experience, and will naturally vary with times and circumstances. We may, however, lay down generally, that this kind of

[1] I use this current phrase to mean the rule of "letting people manage their affairs in their own way, so long as they do not cause mischief to others without the consent of those others."

governmental action shall be reduced within the narrowest limits compatible with the attainment of the end in view: and that it should, generally speaking, take as far as possible some other form than that of directly commanding a man, under penalties, to do what he does not like — or not to do what he likes — for his own good. . . .

CHAPTER IV

THE PRINCIPLE OF LAISSEZ FAIRE[1]

COMPETITION

Few subjects of our time involve issues of more vital import, or have been more discussed, than Competition. I propose to begin the present chapter with a statement of certain propositions which appear to me to constitute a common ground upon which the "individualist" and the socialist may agree as a basis for argument. I shall then consider the bearing of these propositions upon some proposals for social reconstruction.

(1) *Competition in trade and industry must be subject to State regulation.* The form of such regulation is a matter of opinion; its necessity in some form will be universally conceded. Men no longer hope for salvation through "the free play of individual interests," or regard "freedom of contract" as an immutable article of faith. . . .

(2) *Competition, in the sense of an efficient rivalry between individuals, is a condition of social progress.* The

[1] [By William Jethro Brown: born at Mintaro, South Australia, March 29, 1868. He was called to the bar (of England) at the Middle Temple, 1891; professor of law, Tasmania University, 1893-1900; acting professor of law, University of Sydney, 1898; professor of constitutional law, University College, London, 1900–01; professor of comparative law, University College of Wales, 1901–06; professor of law, University of Adelaide, 1906–15; since 1915, president, Industrial Court, Adelaide.

His works include: "The New Democracy" (1899); "The Austinian Theory of Law" (1906); "The Underlying Principles of Modern Legislation" (1912); "The Prevention and Control of Monopolies" (1914).

The selection above reprinted is from his "Underlying Principles, Etc." (London: John Murray, 3d ed., 1914), being chapter VI (parts omitted).]

laissez faire doctrine maintained, in relation to the problems of industrial organization, two propositions: — (*a*) Effective competition is indispensable to social progress: (*b*) In order that competition may be effective, it must be free from State interference. In rejecting the latter of these propositions, it is important not to overlook the truth and value of the former. While competition should be subject to State control, and while the forms of such control may possibly involve a radical reconstruction of the economic order, the need of maintaining the rivalry of individual against individual is indisputable.

The conclusion just stated is based upon one of the elementary facts of human nature. Man is a competitive animal — not in the sense that he will compete for the mere pleasure he may experience in doing so, but in the sense that his pursuit of an end is incomparably more eager if he finds himself in opposition to rivals with a like end in view. I shall venture to illustrate the fact by reference to a subject with which I have had some practical acquaintance — the discipline of the Universities. If students were super-human, such artificial stimuli as degrees, prizes, and scholarships might be dispensed with. Taking the student as he actually is, we find it useful to stimulate his pursuit of learning by the introduction of competition in many forms. We award honors; we draw up class lists in order of merit; we distribute money prizes and scholarships; and we refuse to grant a degree to students who fail to come up to a standard which is defined for practical purposes by reference to relative merits and demerits. We welcome the student who, for pure love of knowledge and in disregard of prize distinctions, plows a lone furrow. But we do not make the mistake of taking this exceptional student as a model for the purpose of determining our general system of discipline.

The State, no less than the University, must take men as it finds them. Whether its aim be the development of

character or the maintenance of the standard of economic efficiency, it must utilize the combative instincts of men. If production is not to languish, if human worth is not to remain a mere potentiality, a keen rivalry is indispensable as a spur to habits of industry. It is also indispensable as a means to the discovery of that exceptional efficiency upon whose utilization the success of any economic system must depend.

Some critics of competition, while admitting its value, declare that the price paid is too high. This general objection takes three forms which deserve separate consideration. In the first place, competition is said to involve a prodigal waste. But this assertion is not universally true: its validity depends upon the conditions under which, or the forms in which, competition is carried on. Competition for profits in the past has undoubtedly involved a deplorable waste of human effort and material resources. But industrial coöperation, the concentration of capital in the form of trusts, and even some forms of socialism, while they substitute rivalry among wage-earners for rivalry among profit-seekers, offer a means of avoiding the waste that takes place under an individualistic system of industry. Competition in these cases, though it may be less keen, is not eliminated; and, at any rate in the case of industrial coöperation, a compensating stimulus to effort may be found in the sense of community of interest. Whether this stimulus proves adequate must depend upon the form of industrial coöperation and the *morale* of the coöperating individuals.

In the second place, competition is said to be cruel. But this, again, largely depends upon circumstances. Even under existing conditions competition is far less cruel than it is often represented to be. But, even if the process were as cruel as it is often represented to be, the mitigation of such cruelty must be effected with a due regard to all the factors of the problem. It is

even better that a few should suffer than that the many should be submerged. If a scheme of social reconstruction does not offer a reasonable guarantee that the best brains and the best workmen shall be brought to the top, it is *ipso facto* condemned.

In the third place, there are some who hold that under any conditions competition is essentially immoral. While I recognize the existence of higher motives to effort than those called into operation by rivalry, the view that competition is essentially demoralizing appears to me to exhibit a strange ignorance of human character. I once read, in a French journal, a violent attack upon fox-hunting. A distressing picture was drawn of men and women, riding furiously, and with their thought intent upon the shedding of innocent blood. To an Englishman, such a criticism only served to reveal the ignorance of the critic. Whether fox-hunting be defensible or not, no one who knows anything about the pastime can suppose that the dominant purpose of the hunter is to gratify a lust for blood. Many attacks upon competition reveal an equally absurd interpretation of the springs of human action. Men do not compete for prizes in order to gratify feelings of personal enmity. Even competition for profits is not necessarily vindictive. A seeks to get as many customers as he can: B has a like object. The competition may become immoral if one or the other is dominated by hatred, or endeavors to defeat his rival by the employment of unfair means. But neither of these conditions is essential to competition.

"When one producer or seller prospers as against another, it is by offering society the better product or the lower price. Viewed, therefore, from the point of view of society, competition is a rivalry in offering most for least — a contest in the rendering of largest service, a war in well-doing — where success is declared to the largest benefactor." [1]

[1] Davenport, "Outlines of Elementary Economics," 187.

The possibility that a trade rivalry may tend to unfair practices is less an argument against competition than an argument for its collective control.

(3) *One of the most important functions of the State is to ensure that competition shall be real.* So-called free competition is often no competition at all. Some classes still enjoy a monopoly of the learned professions; in some countries, hereditary houses have secured a practical monopoly of the land; and, in all advanced communities, great corporations have obtained, or are seeking to obtain, monopolies in trade, industry, and labor. Much as these forms of monopoly differ, they have one thing in common. They are attempts to restrict competition in the interests of particular classes — usually without any regard to the welfare of the community. Although the appropriate remedy may not always be found in legislative attempts to intensify or to restore competition, there are at least many cases of monopoly that should be dealt with in this way.

(4) *A no less important function of the State is to moralize competition.* This proposition does not conflict with that just stated. It may be illustrated by an analogy from the world of sport. The rules of football prohibit punching; the Marquis of Queensberry rules forbid kicking; and, according to the orthodox conception of the game of lacrosse, the lacrosse stick is not to be directed against the skull of the adversary. In all sports there are rules of the game, which define the forms in which rivalry between opponents may find expression. Such rules, in so far as they are good rules, do not enfeeble rivalry; they only regulate its character in accordance with a particular conception of the game. Certain muscular activities, proper in one sphere, may be brutal in another. Football is not a prize-fight; high kicking, however creditable on the music-hall stage, is out of place in the prize-ring; and cutting off the adversary's ear or splitting his cranium,

admirable as it may be in swordsmanship, is no part of the game of lacrosse. The application of all this to political society is obvious. The true function of social regulation is not to eliminate competition, but to direct it along certain lines with the object of retaining its power as a stimulus to effort while removing or diminishing its undesirable consequences. Coleridge described "the free play of individual interests" as self-slaughter on the part of the poor, and soul-murder and infanticide on the part of the rich. Society recognized the justice of this censure, and devised new rules of the game, calling them Factory Laws. Such laws, so far from abolishing competition, had rather the effect of making competition more real. They rescued whole classes of the community from a condition of degradation in which competition had been free in name only.

The history of law is to a large extent the record of attempts to control competition in accordance with higher conceptions of the meaning and purpose of life. While competition necessarily gives the award to the strong, the degree of civilization that has been attained in any particular society may be gauged by reference to the nature of the qualities that make for strength.

The methods adopted by the State in its endeavor to moralize competition have usually been distinguished as legal control, administrative control, and public ownership. . . .

Professor Lovejoy appears to hold that no adequate remedy can be found for his second class of "competition" save through collectivism.[1] But, so far as concerns the most important form of industrial conflict — that between capital and labor — the Wages Board system offers a means for the settlement of disputes on lines that are not inconsistent with the Christian ethic, if I understand that ethic aright. Critics of the Wages Board system have been impressed by its limitations; the impartial observer

[1] [See cap. V, post. — Ed.]

will recognize how much the system has achieved, and what possibilities it offers of further development. It brings capital and labor together under conditions that substitute friendly conference for open warfare. It moralizes, not only competition among employers, but also "competition" between master and workmen.

No one to-day will uphold the *laissez faire* argument in favor of "free competition." Nor, on the other hand, will any sane enquirer question the immense value of competition as a means to economic efficiency and to the development of individual character. It appears to me to be also beyond dispute that competition and State regulation are complementary factors of social progress, and that the general purpose of State regulation should be to preserve competition while moralizing its character. I shall now venture on more debatable ground, and consider the bearing of these propositions upon some schemes for social reconstruction.

Many of the differences of opinion that exist to-day are the result of a failure to keep in view the dual aspect of the problem of State control in relation to competition. Disputants ignore either the *quantitative* or the *qualitative* aspects of the problem. While some people are so eager to maintain the effective power of competition that they dismiss any proposal for the elevation of its plane as Utopian, others are so eager to moralize competition that no scheme can be too Utopian for their acceptance. They take *au grand sérieux* imaginary commonwealths where coöperation supersedes competition and men work for the common good without any other stimulus than the consciousness of duty or the friendly rivalries of altruism. In Grant Allen's community of anarchists, each man labors when he chooses; if he feels so inclined he leaves off for the day and basks in the sun; each member of the community receives food and clothing; and at the end of each week, any surplus that may remain is divided

amongst them as pocket-money. Such schemes of social reconstruction are not for the workaday world in which we live. They imply an exaggerated estimate of human worth. They do not eliminate competition altogether, but they enfeeble it by removing the stimuli necessary to its efficient working. Under existing conditions, competition penalizes indolence and rewards diligence — in neither case with reasonable justice; and therein is the reformer's opportunity. But the first condition of wise reform is a sense of proportion which is lacking in those who propose to remedy existing ills by turning society into a communistic group.

Communism finds few advocates in Anglo-Saxon societies. But the objection just urged against communism applies also to socialism as interpreted by those who insist upon an equality of material rewards for service. This form of socialism retains competition for social distinction and administrative power; but I do not think that men have reached a stage, or are likely within the near future to reach a stage, when reliance can be placed upon the universal efficiency of these as stimuli to effort. If all workers in the socialistic State were to receive an equal remuneration for their labor — the energetic and capable no more than the idle and incompetent — it appears to me that the results would be fatal alike to economic efficiency and to the development of individual character. It is sometimes urged that the material rewards of the existing order derive their power as a stimulus to effort from the social esteem accompanying them, and that the equalization of private incomes would only mean that men would seek distinction in other forms. But, in the first place, this argument does not represent existing facts. Large masses of men work because idleness is penalized; many work for the sake of material comforts; others, again, strive in order to secure the best conditions for their offspring. In the second place, the economic

value of social esteem depends upon the qualities that are socially esteemed. The extreme socialist not only exaggerates the power of a certain motive to effort, but ignores the conflicting ways in which that motive works. As Professor Ely points out:

> "It is the esteem of those about him, the esteem of his own class, which governs a man's conduct. . . . The prize fighter is animated by a desire for social esteem, and his conduct is that which meets with the approbation of a considerable proportion of the entire American community. . . . The achievements of scholars and statesmen, so far as the press of the day is concerned, fade into insignificance when brought into contrast with the encounters of a champion pugilist."

If confronted by the facts to which attention has been drawn, the socialist who relies upon the power of social esteem as a stimulus to effort is driven to predict a swift transformation of human character when once the industrial order has been nationalized. That human character in some respects would be improved under socialism is more than probable; that any swift and fundamental transformation would be effected is extremely improbable. The experience of the past has demonstrated, again and again, the futility of expecting that some new faith, some new social scheme, some new invention or discovery, is going to revolutionize the character of man. The stubborn reluctance of Christendom to assimilate the ethic of the Gospels is one of the most significant facts in history. That reluctance cannot be attributed, solely or even mainly, to economic causes. While individual reform is often swift and enduring, a permanent elevation of the character of a race is a long and arduous process. But, apart altogether from the experience of the past, is it clear, when we look at the actual facts of the life of our own time, that to earn one's living by serving the State exercises any far-reaching influence upon the character of the employee? I have observed the civil servant in

many lands; and I have not found him in any way remarkable for his courtesy or goodwill. Nor does he display an exceptional industry. On the contrary, the term "government-stroke" is an epithet of abuse rather than of eulogy. If one man gains social esteem by the display of qualities that secure promotion, another gains the esteem of his fellow-workers by an excessive anxiety to avoid all suspicion of quickening the pace. We have learnt to despise the old doctrine of "the Deil take the hindmost." We have yet to realize the danger of a new doctrine: — "The Deil take the foremost!"

The equality of material rewards for service is, of course, not an essential element in the theory of socialism. Nor do the arguments that may be urged for or against socialism wholly turn upon the question of competition. But the propositions previously stated in this chapter predispose me to adopt towards socialism the attitude which I am about to indicate. It is necessary to begin with a definition. According to an eminent statesman, we are all socialists to-day. But, to take a concrete example, the man who believes in the need of more factory legislation is not necessarily a socialist. He is not necessarily a socialist even if he advocates the ownership of the factory by the community. The socialist advocates public ownership of the factory as a part of a general scheme for the complete ownership by public bodies of all the means of production, distribution, and exchange.

"The Alpha and Omega of socialism," says an impartial investigator, "is the transformation of private and competing capitals into a united collective capital." [1]

A socialist, declares Millerand, is one who believes in the necessary and progressive replacement of capitalistic property by social property.[2]

[1] Schäffle, "The Quintessence of Socialism," 96.
[2] *Cf.* Ensor, "Modern Socialism," 51.

The importance of distinguishing between socialism and proposals for the extension of public ownership may be illustrated by a suggestive fact. The extensions of the sphere of public ownership in the past have not meant, as is commonly imagined, a corresponding diminution of the sphere of private enterprise. Just as law and liberty are not antithetical in the sense that the increase of law must necessarily mean the diminution of liberty, so public ownership and private enterprise are not antithetical in the sense that by the enlargement of the one the other is correspondingly diminished. Just as liberty may be promoted by State regulation, so the sphere of private enterprise may be enlarged by extensions of public ownership.

"The contention that 'Socialism is already upon us,'" writes Professor Henry Jones, "is true, if by that is meant that the method of organized communal enterprise is more in use; but it is not true if it means that the individual's sphere of action, or his power to extract utilities, that is, wealth, out of his material environment, has been limited. It is being overlooked that the displacement of the individual is but the first step in his re-instalment; and that what is represented as the 'Coming of Socialism' may, with equal truth, be called the 'Coming of Individualism.' The functions of the State and City on the one side, and those of the individual on the other, have grown together. Both private and communal enterprise have enormously increased during the last century; and, account for it as we may, they are both still increasing. . . . The organisation of modern activities, of which the State is only the supreme instance, has placed in the hands of private persons the means of conceiving and carrying out enterprises that were beyond the dreams of the richest of capitalists in the past. The merchant in his office, the employer in his yard, can command far wider and more varied services, and make their will felt to the ends of the earth." [1]

While I believe that many institutions and some industries now in the hands of private individuals should be owned by the State or the municipality, I do not believe that the time has yet arrived when the theory of the socialist can be accepted as a guide in practical politics.

[1] "The Working Faith of a Social Reformer," 104, 109.

I shall venture to state two among the many reasons that impel me to adopt this attitude. In the first place, since a partly-nationalized system of industry appears to me to offer more scope for competition, and to involve less interference with individual freedom, than a wholly-nationalized system, I am disposed to agree with those who regard public ownership as an expedient that should be limited to special cases such as the following: transport services, services vitally affecting the health of the community, and monopolies with regard to which there are no other means of adequate control by public authorities. In the second place, while proposals to extend the sphere of public ownership involve experiment on a relatively small scale, the advocate of socialism desires to experiment on a vast scale. In my opinion the general theory of socialism is in far too undeveloped and controversial a stage to justify such experimentation. I even doubt whether any conceivable advance in socialism as a system of thought will justify the assumption that the public ownership of all capital is preferable to private ownership. I believe that only the school of experience will determine whether, at some future date, it will be possible for the statesman to accept the socialist position as a starting-point for dealing with practical problems. Before that period arrives, the results of experiments in public ownership in various parts of the world will need to be submitted to a much more complete and impartial analysis than has yet been attempted. We shall have much to learn, also, from the success or failure of existing attempts to remedy the evils of private ownership, either by way of administrative control or through the various forms of industrial coöperation. This does not mean an absence of general principle; but it does mean that each proposal to extend the sphere of public ownership should be carefully examined in the light afforded by the progress of thought and the lessons of experience. . . .

TITLE I B. COMPETITION

CHAPTER V

MORALITY OF COMPETITION[1]

THERE seem to be three sorts of moral grounds upon which the prevailing mode of distribution of wealth conceivably may be, and actually has been, criticised. That distribution has been condemned on the ground that it fails to realize the greatest possible well-being of the greatest possible number; or again, on the ground that it is confiscatory, taking from some men that which is theirs of right to give to others that which they have never morally made their own; or again, on the ground that it is competitive. Each of these criticisms springs from a distinctive way of thinking about the moral aspect of social institutions: the first, from the ethics of benevolent eudæmonism; the second, from some form of the ethics of natural rights; the third, from what is most characteristic in the ethics of Christianity. To each of the three corresponds a certain mode of argument for Socialism. When those who are content to judge of social institutions by their total concrete results in terms of human welfare become Socialists, they do so because

[1] [By ARTHUR O. LOVEJOY: born at Berlin, Germany, October 10, 1873; A.B., University of California, 1895; A.M., Harvard University, 1897; attended University of Paris, 1898-9; associate professor of philosophy, Leland Stanford Jr. University, 1899–1901; professor of philosophy, Washington University, 1901–08; professor of philosophy, University of Missouri, 1908–10; since 1910, professor of philosophy at Johns Hopkins University.

The selection above reprinted is from his essay entitled "Christian Ethics and Economic Competition" (Hibbert Journal, 1911, vol. IX, 324–344) (parts omitted).]

Socialism appears to them to promise a higher level and a wider diffusion of welfare than is possible under existing institutions. This seems to be, in the main, the line of approach to Socialism characteristic of the English Fabians; vaguely understood, it is also the source of much current socialism of the "unscientific" sort, the yearning for a time when, through State action, slums shall be abolished, when all men shall be well fed, well housed, well educated, and all shall have a margin of leisure for the enjoyment of wholesome pleasures and the cultivation of their higher faculties and finer susceptibilities. The militant socialist of the Marxian tradition, however, in so far as he condescends to recognize that ethics has any relevancy to the matter at all, rests his case chiefly, not upon the mere intrinsic desirability of the proposed régime of collectivism, but upon the violation of distributive justice which he finds characteristic of the present order. Capitalistic production, he contends, is an arrangement by which wealth is taken from those who produce it and given to those who contribute, of themselves, nothing to the producing of it; our present system is, in the literal sense, he holds, a scheme of expropriation.

The argument especially destructive of the Christian Socialist is different from either of these. The competitive industrial system, even though its outward results were not so bad as they are, and even though the question of intrinsic justice be shelved, would still be open to condemnation simply because it is competitive. And as such it is incompatible with the Christian law of love. It says to men, You *must* fight your brethren, if you would live outside of the almshouse; and if you would live largely and give the good things of life to your children, you must fight hard and persistently. You may, it is true, be generous to the vanquished; you are permitted moments of truce when you may apply salves to the wounds you have yourselves dealt; but even to be generous you must

first fight for the means of generosity — and for the production of a class of vanquished who may afford objects for that generosity. A system, then, the Christian Socialist commonly urges, which puts men into such a situation is one which must be condemned by Christianity, for the simple and sufficient reason that it makes the practice of Christianity impossible. I desire to inquire, in what respects, in what sense, and in what degree our present mode of distribution *is* competitive. The question will probably appear to some too simple to be worth asking. Yet, as a matter of fact, most of the serious replies to the ethical contentions of Christian Socialism have attempted, upon one ground or another, to show that what economists call competition is not by any means identical with an immoral conflict of wills and antagonism of interests; that in reality it proves, when analyzed, not to be competition at all, in any ethically pertinent sense. . . .

Before proceeding to this examination, one or two definitions are needful. By "competition" in the most general sense, I shall hereafter mean any endeavor on the part of one person or group to secure any (real or supposed) good which can be possessed, or which, when possessed, will be valued, only upon the condition that some or all other persons are *ipso facto* deprived of that good, or of some more than equivalent other good. Competition, in short, is the attempt to get or keep any valuable thing either to the exclusion of others or in greater measure than others. By "economic competition" I mean this endeavor when directed towards the attainment either of tangible goods having a market value, or of desirable positions or modes of employment. This definition of the term departs in a significant respect from the usual, though not invariable, usage of economists. For the most part, economic writers have meant by competition the rivalry between persons discharging the same types of function or standing on the same side of the

market, the rivalry between seller and seller, or buyer and buyer — and, in particular, that between sellers of more or less similar things, the struggle of manufacturer with manufacturer, of laborer with laborer, of shopkeeper with shopkeeper. The controversy concerning the "morality of competition" has hitherto largely been a debate in which the two parties have been talking about essentially different issues. The defenders of the "competitive system" have ordinarily used the word in the economists' sense, and have failed to observe that they were justifying something by no means identical with that feature of our existing economic order to which the criticisms of the Christian Socialists are chiefly pertinent. Much, we shall presently see, may be said in moral justification of the endeavor of men engaged in analogous tasks to surpass one another in the effective performance of those tasks — or even to gain superior prizes thereby — which cannot at all plausibly be said of the endeavor of men on opposite sides of a market transaction to give as little to one another as possible and to get as much as possible.

It has sometimes been urged that commercial and industrial rivalry may exist without causing any inimical feelings on the part of the competitors. Men's immediate aims may be opposed and yet their personal attitudes remain kindly.

"So long," observes Professor Cooley,[1] "as I see in my opponent a man like myself, acting from motives which I recognise as worthy, I cannot feel anger towards him, no matter what he may do to me. The conditions of the open market do not, in fairly reasonable men, generate personal hostility."

But Professor Cooley's picture does *not* correspond to the attitudes now commonly characteristic of persons representing different economic factors — the attitude of laborer to capitalist, of tenant to landowner, of middleman

[1] "Personal Competition," 1899, pp. 148–9.

to producer, of consumer to both middleman and producer. These persons are not only conscious of the fact that they are in competition, but also now exhibit highly suspicious and exasperated states of feeling towards one another. Strikes, lock-outs, boycotts, projects of legislation having the avowed purpose of taking from the rich to give to the poor, cries of "confiscation" from the rich when such projects are broached: these things can hardly be considered the outward and visible signs of a "wholesome sympathy" between social classes.

It may, however, plausibly be suggested that the present hostility between social classes may be due, not to economic competition as such, not even to the competition between "labor and capital" for the greater share of the proceeds of their joint productivity, but merely to some unfairness in the rules or conditions of the contest, to the existence of a suspicion on the part of the majority of the players that the game had been so arranged as to assure to a minority the possession of loaded dice. If this unfairness were corrected, we might conceivably — it may be argued — without abolishing competition, have between employer and employed, between buyer and seller, a rivalry as friendly as that now often found between two lawyers practicing in the same courts, or two prosperous manufacturers of the same kind of goods. By some more or less "socialistic" legislation that should still come short of thorough-going collectivism, the conditions of economic competition might be so modified that all the contestants would become convinced that they had a fair chance, and that the game itself, just as a wholesome competition, was interesting enough to be worth playing. . . .

But the competition between buyer and seller, and especially between the buyer and the seller of labor, is far more remotely comparable to the friendly competitions of sport. The capitalist and the laborer are not, in

any practically significant sense, simply striving to see which of the two can perform the same process the more skillfully or effectively. The laborer who receives from a man living in luxury wages which compel him and his family to live miserably or shabbily, is extremely unlikely to feel for his employer merely a generous admiration, as for one who has shown the better performance in a fair race, in which both had an even start and were confronted by similar obstacles. Yet there is a way in which, even without abolishing this relation of capitalist and employee, the competition of the two might be made to assume the form of a friendly and generous rivalry. If, namely, all capital were plainly and unmistakably the product of exceptional skill or energy in labor or of exceptional self-denial in saving, on the part of the individual possessors of it, the distinction between the two sorts of economic competition would partly disappear. But it must be added that the legislative reforms requisite in order to bring about such a genuine and generally acknowledged equalization of opportunities, though they would fall short, could hardly fall very far short, of a thorough-going scheme of nationalized industry.

Yet even such a scheme must, I think, appear unsatisfactory from the point of view of the Christian ethics, so long as there continues not only competition among the representatives of similar economic functions, but also our second sort of competition between the representatives of different economic functions: so long, in other words, as the rewards of the contest are in any degree determined by the process of trading or bargaining between buyers and sellers. It may not be — it assuredly is not — inadmissible that men should strive to outdo one another in useful service; it may not be inadmissible, at least as a concession to the present imperfection of human nature, that men should agree with one another that certain special outward advantages should accrue to those who

best perform such services. But it can hardly be regarded as consistent with any version of the moral teaching of Christianity that a competition in sheer disservice should go on. And in the relation of buyer and seller, as distinguished from that between fellow-producers, we have a rivalry of this sort. It is not a mere rivalry in achievement, or for prizes which society has voluntarily determined to attach to superior achievement; it is really a competition in cupidity as such. . . .

Thus distribution by bargaining places a premium upon an anti-social attitude. The rivalry between exercisers of the same economic function is, on the whole, a competition in serviceableness; he succeeds who produces most with the greatest economy of means, who does best some task which some third party desires to have done. But the competition between the two parties to a bargain is a competition in unserviceableness. For any person or group of persons having anything to sell, the way to success now lies through the establishment of some approach to monopoly conditions — in a small market or a large — and then the creation of a judicious degree of scarcity in the supply of the commodity sold. The material interest of all classes collectively demands an increase of production and an intensification of productive activity; but in our system of distribution — and this is the very essence of any system based upon rivalry between the several factors in production — the separate interest of each factor demands a large measure of abstention from productive activity — or, at the least, the constant reiteration of a more or less insincere intention to abstain.

It cannot, I think, be denied that in this feature of the present mode of distribution lies the real gravamen of the Christian Socialist's indictment of the existing order. The competition which now goes on within and between the several groups in the economic system is, in fact, a

competition for social usefulness paradoxically combined with a competition for social uselessness. And it has the latter character by virtue of the fact that goods or services are exchanged at ratios called market-prices; that market-prices are in the last analysis determined by the process of direct or indirect bargaining; and that the first principle of bargaining is withholding. It is to this "antagonism of utility and distribution" that the Christian Socialist may effectively point as a morally pernicious instance of an opposition of interests and of wills which is not to be eliminated save by the elimination of the bargaining-process from its present place in the machinery of distribution.

The term "competition" has sometimes been used to signify merely the process of industrial selection, whereby in modern societies the incompetent are in the long run eliminated, and the man best fitted for each function in our complicated social life is (at least sometimes) discovered and given that function to discharge. The antithesis to competition, in this sense, is the assignment of functions by status, without comparison and selection. Now, this shuffling of men about until the right man is found in the right place, is unquestionably advantageous in the highest degree to society at large. And the inference seems to have been drawn or implied by some critics of Socialism that all economic competition is therefore, in its final consequences, advantageous. . . .

The competition between the laborer and the owner of capital, between the producer and the consumer, between the tenant and the landlord, cannot be said to be nicely calculated to bring about the selection of superior aptitudes. When six laborers compete for employment at the hands of a farmer who needs only three, the best three will probably be chosen. But there is nothing in the process which shows that, as between the farmer and all

six of the laborers, it is the farmer who has the best natural endowments for the efficient management of land, or for the productive use of the profits of that activity. It is true, as has already been pointed out, that much might be done to equalize opportunities, and thus, by reducing all the modes of competition approximately to a single, free-for-all race, to render the process throughout more truly selective. . . .

We come at last to the familiar piece of reasoning by which economic theory has long sought to demonstrate the ultimately beneficent, the really non-competitive, character of economic competition. The bearing of this familiar economic principle upon the ethical question at issue has never, perhaps, been more lucidly expressed than by an American economist in a recent text-book:

"It is not true that the rivalries of competition are necessarily or commonly hostile conflicts of interest, in which the well-being of one is set over against the success and prosperity of his neighbors. True, each is trying to undersell the others — to get the trade, to gain the market and to control it — at the expense or even to the ruin of his rivals. This, however, proves, not that competition is a rivalry between each member of society and society as a whole, but only that it is a rivalry between competing producers. It is a co-operation between each competitor and society. When one producer or seller prospers as against another, it is by offering society the better product or the lower price. Viewed, therefore, from the point of view of society, competition is a rivalry in offering most for least — a contest in the rendering of largest service, a war in well-doing — where success is declared to the largest benefactor."[1]

It would be an austere Christian Socialist indeed who should find more than a venial sin in a war in well-doing. But there seem to be three serious reasons for doubting whether such a description can be applied without great qualification to economic competition in all its forms. In the first place, there is nothing whatever to show that the

[1] Davenport, "Outlines of Elementary Economics," 1908, pp. 186–7.

distribution actually resulting, now or at any given time, from such a system of universal but counterbalancing competitions will be a good distribution, or one accompanied by social harmony and a general reign of brotherhood. For the outcome of the competition will in practice depend upon changing conditions of population, of supply and demand, of the comparative strategic advantages of the positions occupied by the several competitors in their dealings with one another. For example, it is no doubt true that the laborer, in his capacity as consumer, gets the chief benefit of that continuous beating down of prices which competition causes; but it is also true that, where neither laws nor trade-unions interfere with the free play of competition, money-wages are beaten down by the same process, and it depends upon the varying states of each local market whether the gain offsets the loss. Meanwhile, it is apparent as a fact of history that — even with the maximum demand for labor and the maximum lowering of prices — the real wages of labor have never long remained so high as to produce any close approach to equality in the lot of the average laborer's family and that of the average capitalist's or merchant's or landlord's.

In the second place, the economist's traditional *apologia* for competition seems curiously *mal à propos* at a time when precisely that competition *within* each economic class — which, when generalized, has been supposed to be the saving feature of the situation — is conspicuously tending to disappear, and is doing so with, perhaps, results on the whole advantageous. In many trades, laborer no longer freely competes with laborer for employment; and in the most advanced branches of modern business, producer no longer competes with producer for the larger sales to the consumer. Organization and consolidation of interests in each class tend to be the rule; so that the competition which remains stands out all the more nakedly as a competition between economic classes as units. And,

finally, to this latter sort of competition the usual argument of the economists is not in the least applicable. That argument never really faced the issue respecting inter-class competition as such; it merely pointed out that rivalry within a class was to the interest of those outside this class, and that each class, therefore, in so far as it was engaged merely in this internal competition, was benefiting all others. But no class ever was engaged merely in that competition; it always has at the same time been endeavoring to increase the share in the national dividend apportioned as the reward of the function which it performs, and to decrease correspondingly the share going to the representatives of other functions. And it has always done this by maintaining the posture of the bargainer — by endeavoring to sell in the dearest and buy in the cheapest market; in other words, by getting from others the most possible, and by giving them in return the least possible. This attitude has never been very accurately describable as "a contest in the rendering of largest service."

After this review of the principal arguments in the case, it seems legitimate to attempt a judicial summing-up of the question under controversy between the Christian Socialist and the apologist of economic competition. The verdict cannot be unqualifiedly for either side. Socialist writers, on the one hand, have condemned competition in an unduly promiscuous and uncritical way. For, as we have seen, competition and hostility are not necessarily synonymous; there are kinds of competition which could hardly be abolished, even under collectivism, without thereby leaving all human life the poorer; and obviously any Socialist who proposes that, in a reorganized society, men shall be given differential rewards for unequal services, *ipso facto* commits himself to the perpetuation even of purely economic competition. But, on the other hand,

there is one aspect of our present "competitive system" which Christian ethics may, and must in consistency, condemn. It is a kind of competition to which economists have not ordinarily applied the name; but it is, as we have seen, in reality the extreme example of competition for economic goods, an absolute and unrelieved antagonism, a brute pitting of will against will, and of the interest of one against the interest of all. It consists in the fixing of prices, and thereby indirectly of incomes, by the process of overt or concealed bargaining. This process is of the essence of the present method of distribution; it would be eliminated (in its present form) by collectivism; and it can apparently be eliminated only by collectivism. For if virtually the entire machinery of production and distribution were in the hands of the State, the relation of buyer and seller would be reduced to a negligible minimum; practically all incomes would have the form of salaries for services rendered the community by the individual; and the differing amounts of those salaries would be determined by the collective judgment of the community, expressing itself through its organs of legislation and administration. Those who then had the egoistic desire for greater salaries could realize it only by increasing the measure of their service — not, as now, by threatening to withhold service. In view of these considerations, there undeniably appears to be, even when all necessary concessions and qualifications have been made, a profound inner incongruity between at least one phase of economic competition and the spirit of the Christian ethics — and a natural affinity between that spirit and the ideals of socialism.

Yet, alas! one great difficulty remains. If any inequality of rewards is to be retained, by means of what formula is society to apportion those rewards? By what criterion will the Socialist State determine the relative value of different social functions — since all will be equally

necessary? Clearly the matter will require to be settled in some way; and as clearly — unless in the meantime some philosopher is able to reduce the principles of rightful distribution to something like an exact science — there will be no established standard by which to settle it. Differences of opinion — to say nothing of conflicts of interest — will then inevitably arise. There will perhaps be those who hold that practitioners of the uninteresting, if also unintellectual, art of bricklaying deserve better of the Republic than those assigned to the duties of university professors; the latter, it may be suspected, will regard this view with scepticism. And the partisans of differing opinions of this sort will, if sincere, begin political agitation for reforms in the laws of distribution. Thus competition between the representatives of different economic activities, having been expelled by the door, will come in again by the window. I do not think one can fairly predict that it will be a case of the return of seven other devils worse than the first. For, in the first place, under no conceivable scheme of distribution by legislative enactment in a democracy could the inequalities of material condition be so monstrous as they are now. Moreover, the struggle, being transferred to the domain of politics, would not involve a direct opposition between utility and distribution within the process of industrial activity itself. And finally, such inequalities as existed would, after all, express the judgment of the majority, formed after deliberation and discussion. Yet it remains true that that judgment would, in these matters, have only rough empiric impressions to guide it. The general formula, no doubt, might readily be arrived at: a "distribution according to needs," meaning thereby, in Mr. Hobson's phrase, "those needs which society, taking an enlightened view of social interests, confirms and endorses." Yet I hardly think that such a formula would be found in practice greatly to simplify the problem

Society, therefore, in dealing with the matter of distribution, could only slowly and with abundant friction arrive at the unanimity of opinion which would be the condition precedent to harmony of feeling and concord of wills.

The truth is that Christianity's yearning for such a harmony could find full realization in a concrete economic order only through a scheme of complete equality in distribution. Those who regard such a scheme as impracticable or undesirable should recognize that they have thereby given up all simple, clear-cut, ready-made formulas for distribution. They can therefore look forward only to a gradual approximation to harmony, in proportion as men, through debate and experiment and the gradual increase of reciprocal understanding, work out a plan for allotting functions and privileges and possessions which seems to the general reason fairly satisfactory. Yet the Christian Socialist is assuredly right in deeming it, in itself, a morally desirable consummation that the issue should be appealed to the general reason, and not be left to the blind antagonisms of individual desire.

CHAPTER VI

ETHICS OF THE COMPETITIVE SYSTEM[1]

I. CAN COMPETITION BE ETHICALLY FAIR?

[§1.] To say "fair competition," is, according to some people, nothing more or less than to say "fair brigandage." To discuss the ethical problems which competition raises is in their estimation on a par with the attempt (which to-day is made only for children) to attach a halo to the head of Robin Hood. Business competition, they say, is in its essential nature nothing but war. It may be correctly represented by two kings marshaling their forces to seize each other's territory; or, if you prefer, by two dogs fighting for a bone. Always and everywhere it is the attempt to gain through the loss of another. To talk about applying the principles of morality to this brutal struggle is to talk nonsense. For morality involves precisely a regard for the interests of other human beings, and a consequent willingness to be satisfied with less than one has power to seize. Competition says: "Thou shalt starve ere I want"; whereas morality says: "All men are brothers, and should treat each other as such."

This description of business competition may seem plausible at a casual glance. But a square look will show that it distorts fundamental facts. War involves two

[1] [By Frank Chapman Sharp: born at West Hoboken, N. J., July 30, 1866. He graduated at Amherst College, A.B., 1887; attended the University of Berlin, Ph.D., 1892. Since 1895 he has been a member of the Department of Philosophy at the University of Wisconsin.

The selection above reprinted is from his essay entitled "Some Problems of Fair Competition." (International Journal of Ethics, XXXI, 123–145: Jan., 1921). Parts of the original essay have been omitted.]

parties, one of whom can gain, if he succeeds in gaining at all, only at the expense of the other. But business competition cannot be represented by less than three parties, two competitors and a prospective purchaser. Business competition is the concurrent offering to this third party of services or other goods on the part of the competitors, as a result of which the former accepts the offer most favorable to himself and is in so far better served. Business competition is thus competition for the opportunity to serve. This is equally true whatever may be the motives involved. In fair competition that person gains the opportunity to serve who really makes the better offer. In return he receives the reward. The loss of the second competitor is thus only indirectly due to the action of his rival. It is due primarily to the act of the purchaser in choosing what he regards as the better alternative in preference to the poorer. No wrong is thereby done the rejected competitor unless it is the duty of the purchaser to choose the less advantage rather than the greater. It is impossible to see how this can be the case under any but exceptional circumstances. But if such a bizarre theory of duty is to be maintained, then we must insist that it is the customer, not the successful competitor who is primarily at fault.

[§2.] Accordingly if there is anything essentially immoral about competition it must lie not in the relation between competitor and competitor but in the relation between the *purchaser* and the competitors. This relation, it is obvious, may take a number of forms. Instead of waiting for the competitors to come to him the would-be purchaser may go out actively in search of them (shopping). He may inform one man of the offer of another, in order to obtain better terms than the former would have offered him spontaneously. He may refuse to buy at the terms offered, preferring either to wait for future opportunities, or if the article be not a necessity for him,

not to purchase at all. This is what is called "the higgling of the market." It must be carefully noted that apart from the use of intimidation and deceit, all bargaining consists essentially in some one of the above modes of activity.

Is there, then, anything essentially immoral in actions of this sort? It is impossible to see how they differ in kind from accepting the best offer thrown without any effort on one's own part into one's lap. The bargainer may have been trying to "overcharge"; or the would-be purchaser to pay less than the goods or services were "worth." In either case the party threatened with injustice is obviously entitled to get better terms if he can. In cases of overcharging and underpaying alike, however, the wrong is not inherent in the competitive system as such, but is due to that spirit of selfishness which wherever it exists will in any conceivable economic system get the most for itself at the least cost that circumstances permit.

[§ 3.] In so far as an economic system fails to secure the distribution of goods at a fair price it is of course imperfect. It is equally imperfect if it fails to raise the production of goods to the maximum desirable. Production is just as much a moral issue as is distribution. As far as the individual is concerned his failure to do his part to increase the world's store of goods is just as truly an exhibition of selfishness as is his refusal to part with goods once created except at an extortionate price. An economic system, accordingly, must solve two problems, that of production and that of distribution; and if by any chance the full attainment of one end should prove to be incompatible with the full attainment of the other it must make the most satisfactory compromise that conditions at the time permit. If then it could be shown that the system

[1] It may be said that the socialistic system makes it possible to determine what is a fair price, while a competitive system does not. I have dealt with this point, by inference at least, in an article in [Int. Jour. Ethics, Volume XXX, page 372, entitled, The Problem of a Fair Wage.

of pure competition (which, as Mill and others have pointed out, does not exist to-day and probably never has existed, at least on a large scale) solves more satisfactorily, in the long run, than any other attainable system, the double problem of production and distribution, the fundamental objection to competition as inherently immoral would fall to the ground.

Whether on the whole competition does work better than any other system which it would be possible to introduce and keep going is a question I do not mean to consider in this paper. I wish rather to discuss some important corollaries that flow from giving it an affirmative answer.

[§ 4.] What, we shall inquire, will be the attitude of a man who accepts the affirmative answer and who also is permeated through and through with a love of his fellow men? Obviously he will wish the competitive system to continue. If such a man enters business he will give his customers the best service of which he is capable, and he will take the rewards that come to him as a result of his success in offering better services than his competitors — and he will take these rewards with a good conscience, just as he will approve of anyone else accepting such rewards under the same circumstances. In everyday business life the economic motive is indeed very frequently the mere selfish desire to get money. But a man who is guided by higher aims can without difficulty find a place for himself in the competitive system also, provided always that he believes that this system is on the whole the most satisfactory one at present available for supplying the economic wants of man.

The socialistic writers beg the whole question when they urge the antithesis, as they are constantly doing, between "a system of production which will be carried on for use and the present one which is carried on for profit." [1]

[1] See H. W. Laidler, "Socialism in Thought and Action," p. 123 and *passim*.

Where the producer is selfish and lazy he will, under any régime, competitive or socialistic, do the poorest kind and the smallest amount of work he can possibly "get away with." Where he is selfish and ambitious he will shape all his work so as to make the best possible show, and appearance will coalesce with reality only by accident. In either case, he will, whether alone or in coöperation with others, demand just as large a return for his services as he thinks he can possibly get, and will not hesitate to squeeze the orange for the last drop of juice. The socialists seem to suppose that under their régime "practically all incomes would have the form of salaries for services rendered the community by the individual; and the different amount of those salaries would be determined by the collective judgment of the community, expressing itself through the organs of legislature and administration." But to suppose that any given economic group, as the coal miners, will peacefully accept whatever wages "the collective judgment of the community" decides to assign them, when by "direct action" or any other kind of action they can obtain more, is to suppose the magical disappearance in socialistic society of that spirit of selfishness which is precisely the thing that gives its evil character to our own.

Essentially the same criticism can be urged against the socialistic talk about "replacing competition with co-operation." Coöperation may be a name for a purely external relationship, for the mere fact that, from whatever motive, one man helps another in the attainment of his ends. This form of coöperation obtains to-day between the customer and the competitors. All the latter are more than ready to serve him, and the one selected actually does so. But if coöperation means an inner spirit it may be just as wanting in a socialistic society as it often is to-day under competition. The coöperator, in other words, may have his eyes fixed singly upon what there is

in it for him. In either system, then, the selfish and the unselfish man will act each after his kind. There is thus as much room in the competitive system for the good man and honorable service as there is in the socialistic for the bad man and eye service. And in both systems alike the bad man will look for the grafter's or the bully's pay.

There may be such a thing, then, as fair competition. As competition has two aspects, so a completely fair system would involve right relations, first between competitor and competitor, and second between buyer and seller. The two relationships are commonly inseparable. As far as a distinction is possible, however, this paper confines itself to the first. As between competitors competition is fair when each would-be seller seeks success solely by offering better service (including terms) than does his competitor. Competition is unfair when success is sought in any other way.

II. UNFAIR METHODS OF COMPETITION

[§ 5.] This conception of the nature of competition and the distinction between fair and unfair competition supplies a complete justification of the code of morality traditionally acknowledged to be binding as between business men. It manifestly excludes the use of violence, intimidation in the sense of a threat to inflict a wrongful injury upon another, deceit, the making of certain contracts, and the breaking of most others. A study of the traditional code of fair competition would raise many interesting, important, and perplexing questions. But I do not mean in this paper to undertake this task, but rather to employ our definition for an appraisal of certain methods of competition which till within perhaps the last two or three decades passed largely without condemnation on the part of the general public, but which nevertheless are responsible to a very considerable degree for the total

rejection of competition as a system on the part of certain high-minded but all too hasty critics. The most important of these practices may be included under the name of predatory competition. By this is meant the direct attempt to *cripple or destroy the business of a competitor by the device of selling one's goods below cost.*

[§ 6.] Predatory competition includes what is called local price cutting. This is a practice open only to corporations doing a business over a large territory. It consists in selling below cost in one locality where competition is keen, and at a correspondingly higher price where competition is either non-existent or comparatively innocuous. But local price cutting, we must be careful to note, is only one form of predatory competition, although the most common one. Whatever and wherever an organization may sell, and whatever may be the means by which it plans to recoup its losses, the essence of the act is always the same. It is the selling of one's goods (whether a single line or all lines) at such a price as would if continued lead to the seller's own bankruptcy, with a view to ruining a rival or at least driving him out of some particular field.

The wrongfulness of such action follows directly from our definition of fair competition. Having said this it might seem as if all we need do were to rest our case upon the correctness and adequacy of our definition. But the practice in question has vigorous defenders; and what is more important, is at present widely and severely condemned by public opinion and forbidden by law only under certain conditions, and for reasons extraneous to the act itself. So that in the interests of clear thinking in morals and consistent action in law both the arguments by which it is defended and those by which it is commonly condemned need to be examined with some care.

The common view seems to be that predatory competition is not wrong *per se*, but only when it is practiced by the "trusts" or other very large corporations in an attempt

to monopolize the trade of a certain territory or of the nation as a whole. Certainly it is placed under the ban of the law only when this condition applies. The position that it is wrong as between large concerns while quite innocent between smaller ones has been vigorously attacked by Mr. G. H. Montague.[1] He takes the position that it is always and everywhere justifiable. The essential feature of his defense is the assertion that we cannot have one code for large businesses and another for small ones. He further alleges that selling below cost lowers the price to the consumer and is for this reason "the most innocent mode of competition conceivable." Finally there runs through his paper as through most of the literature in advocacy of this practice the intimation, which with some writers appears as bald assertion, that this kind of a struggle contributes in the long run to economic progress because it leads to "the survival of the fittest." Thus, it is supposed, do things present and things to come all work together for good.

The plea of lower prices need not detain us for more than an instant. When a "trust" lowers prices below the cost of doing business in one locality it takes pains to recoup itself amply in some other district. If it is not able to do so in any other place it will do it in the same locality at a later time when its battle has been won and its competitors killed off. In fact it ordinarily does both.

The "survival of the fittest" is a catch phrase that has been used now for more than a generation in the discussion of social problems by a lot of people who are apparently unaware that the term is primarily a technical term in biology, bearing a highly specialized meaning which is quite different from the sense in which it is commonly used in the discussion of current social problems. In the economic world the fittest are those best fitted to do the world's work; they are the fittest to serve. The

[1] The Atlantic Monthly, Volume 95, p. 414 (1905).

survivors of predatory competition are likely to be those possessing the longest purse. But the possessors of the longest purse are not necessarily the fittest. Fitness for the industrial world includes intellectual ability, willingness and power to work, and character, in addition to financial resources. But financial resources often stand for nothing but luck, for luck plays at least as large a part in business success as the cards do in determining success in an evening's game of whist. The possession of a long purse, therefore, is by no means the necessary concomitant of the personal qualities which fit men for a useful business life.

Where there is a real disparity in economic fitness between competitors, this fact will in the course of time demonstrate itself through the ordinary processes of fair competition. In the long run, for the most part, customers will go, if they are permitted to do so, where it is to their interest to go. Predatory competition therefore is not needed to separate the economic chaff from the wheat; the normal processes of industrial life will attend to that.

The fundamental principle of traditional morality, both as incorporated in law and in any consistently worked out code of private morals is: So use your own as not to injure another's. The fundamental principle of fair competition, as revealed by a direct analysis of the competitive system itself, is that competition is fair in so far and only in so far as success is determined by superiority of service. Both roads lead to precisely the same terminus.

We may if we choose subsume our conclusion under the ancient provision of the Eighth Commandment, and thus place it under the ægis of our traditional morality. Viewed in one light a business may properly be regarded as a piece of property. If successful it certainly has a money value which may be sold as "good will." Therefore it

may not be destroyed directly in the pursuit of merely selfish ends any more than may a farmer's orchard. If the fruit trees fail to bear fruit, the owner can blame no one but himself. The same is true if a business withers away because an insufficient number of persons care to avail themselves of the services it offers. But the active direct destruction of the one is on precisely the same moral plane as the direct destruction of the other.

[§ 7.] A farther study of this principle, so as to include the rest of its leading applications to the problems of sale and purchase, will clarify its meaning and indicate its significance for the conduct of business life. We may begin with the practice of inserting what are called "tying clauses" into contracts of sale; a practice which is generally known as the formation of factor's agreements.

There are two leading varieties. The first consists in the refusal to sell except on condition that the purchaser agrees to supply his needs, either in some one line or in all the lines which the organization markets, exclusively from the one source. The second consists in charging the customer a higher price than his competitors are charged unless he engages to make all his purchases, whether in one line or in all lines (as the case may be), from the one organization.[1]

The power to *force* such *agreements* depends upon the existence of a monopoly or quasi-monopoly in some one line or group of lines. Thus the General Electric Company purchased from the foreign patentees the exclusive right to the manufacture and sale in the United States of tungsten and tantalum electric lamps. Because of the demand for these lamps the retailer was as good as compelled to carry

[1] These agreements take a large number of special forms, which for the sake of keeping the fundamental principle in the center of attention, I have ignored in the preceding statement. For the details see W. H. S. Stevens, "Unfair Competition," Chapters IV, V, VII; also the Report of the Commissioner of Corporations, March 15, 1915: Trust Laws and Unfair Competition, pp. 319–322.

them. If he did not do so, his customers, after the fashion of customers, would have turned their backs upon his store in disgust. Hence the company was able to force its carbon filament lamps upon the retailer, regardless of whether they were the most satisfactory available in quality and price or not. This monopoly was thus based upon patent rights. Sometimes the power to force goods down the throat of a wholesaler or retailer depends upon the ability to produce some line or lines so much of a favorite among consumers as to be the object of an insistent and extensive demand. The favor of the consumer may be due to nothing but widespread advertising, or it may have its source in some particular quality which the other manufacturers are unable to duplicate. The ability of the American Tobacco Company to force a "full line" upon unwilling retailers has had its source in these facts.

The evils of this practice are numerous and manifest. It destroys the chances of producers who, apart from the control of some specialty, may be as efficient as, or more efficient than those who thus seize their business; it prevents retailers who wish to serve as agents for different parties from doing so except under conditions which are practically prohibitive, and is thus a form of coercion; most serious of all, it limits the field of choice for the ultimate consumer and thus directly destroys the open market. In fair competition goods are sold on their merits. In this practice the goods of competitors are beaten and driven from the market not because of their inferiority but because of some specialty by means of which the possessor screens the inferiority of his other products or the unreasonableness of his prices.

The nature of the arguments urged in defense of this system may be seen from the following quotation.[1] "Factor's agreements are another phase of the modern wholesaler's endeavor to take into his own hands control

[1] 30 Harvard Law Review, 72.

of the whole process of distribution in order to protect himself against inefficient, unscrupulous, or unenthusiastic retailers. Such a contract assures the seller of wholehearted 'pushing' of his goods by the retailer, while at the same time it effectually limits the field in which the wholesaler must meet the competition of his rivals." In the above trinity "unscrupulous" is given a place evidently for the sake of its effect in raising the tone of the argument to a high level. Why a man who sells, let us say, a kodak camera made by the Eastman Company, and the photographic paper made by a rival should be any more unscrupulous in his dealings with the Eastman Company than a man who sells what he regards as an inferior paper solely because he must do so or get out of business, is a mystery which no special pleader has yet succeeded in explaining. Why such a retailer should be less efficient or less enthusiastic about selling a kodak camera which he has bought because he believes it to be the best thing of its kind in the market, is also past comprehension. What really counts in this defense is the last sentence: "It effectually limits the field," etc. This precisely is its condemnation.

If it be asked what is the difference between forcing a retailer to sign a factor's agreement and setting up an exclusive agency for the sale of one's own goods, the answer is that there are a number of obvious differences, the most of which were, in effect, enumerated just above. Confining our discussion to the unfairness of which the retailer or other distributer is a victim the chief difference between the two modes of doing business is that, as has been already pointed out, the factor's agreement is the product of *force*. The retailer is thereby compelled to carry certain goods which he does not wish to carry and to refrain from carrying others which he wishes to be in a position to sell. If the retailer carried the goods of a single producer on his own volition, there would of course

be no point in compelling him to sign an agreement to that effect. In fact many a dealer has fought against this constraint for months and yielded in the end only because he has found himself placed before the alternatives of surrendering his freedom of choice or going into bankruptcy.

There are other differences between the establishment of an agency and the demand for a factor's agreement. An exclusive agency is *plainly marked* as such; he who enters the shop knows beforehand what he is doing. The retailer doing business under a factor's agreement is supposed by the public to be not an exclusive agent but one who picks from the open market what he regards as the best it has to offer. Finally in the agency, properly so called, the obligations are *mutual* as between agent and principal. The principal supplies the capital and carries the agency in bad times as well as good; in the factor's agreement the man who is forced to serve as agent carries all the risks himself. If he fails the company loses nothing, but throws him away like used tea leaves and finds some one else to put in his place.

The second form of factor's agreements may be defined in two different ways. It may be said to consist in offering the retailer a special *rebate* on all goods purchased provided he agrees not to purchase from a rival. Or it may be described as charging the retailer a higher price than his competitors are charged unless he signs an exclusive contract. Obviously these are but two ways of saying the same thing. The Madison Gas and Electric Company has a series of charges for its products and allows its customers a rebate if they pay their bills before a certain date. Whether by this arrangement the consumer is getting a rebate, or whether he is simply being penalized for not paying his bills on time is a matter really not worth discussing. The business man who is forced to choose between buying superior goods elsewhere and accepting a "rebate" knows that if he is to remain in business his

prices must be approximately those of his competitors. The original price apart from the rebate may easily be placed at such a point, and often has been (and probably is being to-day) placed at such a point that while he is quite at liberty to buy or not as he chooses he cannot possibly sell if he does any of his buying elsewhere. And where the discrimination against him is not so excessive it may still be enough to make the difference between floating and sinking.

At first glance, to be sure, this form of factor's agreement seems to be merely one application of the principle on which all wholesale trade is based. But there is an important difference. Wholesale rates are based upon the amount you buy from a given firm; the rebates under discussion are based upon what you buy from other people. In other words they are not based upon the actual amounts purchased from the firm granting the rebate, but upon whether you have bought any amount whatever from its competitors. The granting of wholesale rates is legitimate because, for reasons too well known to require mention, they are conducive to healthy business conditions; the granting of the latter is illegitimate because the aim is precisely the same as in the demand for exclusive agreements, *viz.*, to strangle competition and destroy the open market.

[§ 8.] The factor's agreement, we see, aims to cripple or destroy a competitor by illegitimately inducing or forcing people not to buy from him. The next method of unfair competition which we shall consider is the attempt to reach the same end by *inducing other parties*, whether by offering rewards or threatening penalties, *not to sell to him*.

This practice may take many forms. Some years ago, in a certain Minnesota city, the owner of a department store who was also a banker, succeeded in preventing the proprietor of a rival store from getting a loan not merely

from the bank of which he was the president of the board of directors, but also from every other bank of the city. The credit of the rival was excellent, and his security in itself perfectly satisfactory. The other banks simply did not dare offend a man with great prestige by serving a man with little or none.[1] . . .

After what has been said the wrongfulness of these practices needs no discussion.

[§9.] In the preceding cases the wrongful actions consisted in inducing third parties not to sell or to buy from one's competitor. We turn now to the *refusal to supply a competitor* with what is needful for the conduct of his business. The problem is something of a paradox. It will ordinarily be of no practical significance except as he from whom the sale is demanded is the possessor of a monopoly. On the other hand, in this event the problem will in most instances lose its importance for practice, in that the courts will compel the monopolist to serve, and since both parties are perfectly aware of this fact the question will seldom arise. Suppose, for example, that the owner of a store happens to be the owner of the town's electric lighting plant. Upon his first threat to cut off the supply of electrical current from the store of a rival the latter could apply to a court and could secure an order for service on the ground that the supplying of electricity is a "business affected with a public interest." While these considerations rob the problem of most of its practical importance, they render it one of the greatest interest for the theory of business morality. For they show that a certain very significant conception of ethics has so far become common property that the courts, which are apt to lag behind at least the more advanced portions of public opinion, regard it as beyond the range of controversy. This conception is that when a person sets out to supply

[1] A somewhat similar case will be found in "Trust Laws and Unfair Competition," p. 328.

a community with necessities and the community is really dependent upon him he is morally bound to serve all alike who have the money to make the proper return, including his rivals in business. The state has no right to compel a man to do that which it was not his duty to do without compulsion. If the compulsion which it exercises is justified in this instance, this means that the duty was there in the first place.

That this fundamental conception of the common law is a correct one is an immediate corollary from our definition of fair competition. You may not injure another in the pursuit of your own selfish ends — there is no provision here for exceptions in the matter of rivals. . . .

[§10.] We have asserted a duty to guide our buying and selling policies by considerations which take us out of the area of whim, prejudice, and antipathy, and which may at times call us to rise above the demands of economic self-interest. But it is obvious such a duty cannot be *unconditional.* No one is required (under ordinary circumstances) to sell goods to a firm whose credit is shaky. A fire insurance company ought not to be expected to insure the property of a man whom it suspects of arson. A business man, in other words, has the right to serve himself in serving others just as far as it does conflict with larger interests. Accordingly he certainly is not obliged to sell his goods to or buy goods from one who is injuring his interests by a policy which represents no contribution to the public good. Accordingly, under the conditions imagined, a boycott to protect the existence of one's business would be justifiable.

By the admission of this exception to the rule which we have been endeavoring to maintain we may seem to have opened the door to everything to which it was closed. If a man may in self-defense consult the interests of his own business in determining his buying or selling policy, where is this concession to end? Every business man finds

himself surrounded on all sides by eager, vigorous competitors. Even if they are obeying the laws of fair competition they are striving with all their might to get trade away from him, and this means that they are doing that which if they could always win would ruin his business. Some of them may be small now, and their competition of no particular significance. But who can tell when a man of exceptional ability and energy will arise from amongst them, or when some one of them will obtain, perhaps from an outsider, a large accession to his capital? Who can tell whether one of his more powerful rivals is not working on a plan which when carried out will lose him every one of his customers? Therefore if self-defense is a legitimate excuse for a buying or selling policy aimed at a rival, why not start a "preventive war"? why not kill the rival now while one has a chance? "I have put for a general inclination of all mankind," writes Thomas Hobbes, "a perpetual and restless desire of power after power that ceaseth only in death. And the cause of this is not always that a man hopes for a more intensive delight than he has already attained to, or that he cannot be content with a moderate power; but because he cannot assure the power and means to live well, which he hath present, without the acquisition of more." [1]

The answer to this objection seems simple in principle, however great the difficulties that it may sometimes raise in practice. Unless we are going to accept the creed of a Tolstoi we must allow that a man may defend himself against wrong, at least where the matter is beyond the jurisdiction of the courts. Certainly he is not called upon to play into the hands of those who are seeking illegitimately to injure him. But from this it does not follow that he may ruin or in any way injure his competitors because of the fear that they may some day succeed through better service in attracting his customers away from him.

[1] "Leviathan," Chapter XI.

It is of the very essence of the competitive system that none of its members can ever feel absolutely secure in his position. One of the chief arguments in its favor, as against socialism, is that, human nature being what it is, no large body of men can be trusted to live on Safety Street. Many or most of them would, it is believed, grow slothful, careless, indifferent, perhaps overbearing or downright oppressive. As was said of a famous piece of bacon, we must take the lean with the fat. We have no right to go to any length to secure perfect safety for our own business while denying, in the name of the competitive system, this right to everyone else.

The right so to guide our buying and selling policies as to protect our own legitimate business interests, as the term legitimate has been defined in this paper, cannot be denied because it is subject to abuse. The recognition of this right undoubtedly opens a door to grave aberrations because of the tendency of human beings to look with partial eyes at situations in which their own interests are vitally concerned. But there are no "fool proof" and no "rascal proof" principles of morality. He who expects the moralist to produce them is asking for a medicine that if taken as prescribed on the bottle will cure all physical ills.

[§11.] If there is any truth in the contentions of this paper it is more important that they should be heard and heeded to-day than at any time since the rise of the modern economic system. "We in Europe know," the British ambassador to the United States recently said, "that an age is dying." If we in this country do not realize what this means, we shall have an opportunity to do so before very long. It means that the age of unquestioned privilege is disappearing, alike in the economic and the political field. For a century or more the chief beneficiaries of the competitive system have been assuring their less favored brethren that "all is for the best in the best possible of

economic worlds." These less favored brethren are now proposing to examine the situation for themselves. If they decide this doctrine is untrue, they will unquestionably turn upside down the existing order. Those who believe in the competitive system should therefore see to it that it is shorn as quickly as possible of all excrescences, for in the eyes of prejudice the bad will always obscure the good. It is submitted that the practices condemned in this paper represent in sober truth a real excrescence. They cannot be justified by the same criterion by which we have sought to justify what we have called fair competition; they are for the most part easily separable from those methods of buying and selling which we have tried to exhibit as legitimate; they could not exist for a moment except as parasites upon an economic body to whose normal processes they are utterly foreign. With the attitude of the European worker what it is, and the probability that the attitude of the European worker of to-day will be that of the American worker within a generation, it is essential that our courts, our legislative bodies, and public opinion as a whole should learn to distinguish between what is fair and what is foul in our present competitive system; and having learned, should act. In particular, if "our captains of industry" and the men who make, interpret, and enforce our laws repeat the stupid mistakes of those who surrounded the late Czar Nicholas in the opening years of the Twentieth Century, a not dissimilar fate may fall upon them, — and upon us.

CHAPTER VII

COMPETITION AS A SOCIAL FORCE[1]

POPULAR CONCEPTION OF COMPETITION

Competition, as a universal phenomenon, was first clearly conceived and adequately described by the biologists. As defined in the evolutionary formula "the struggle for existence" the notion captured the popular imagination and became a commonplace of familiar discourse. Prior to that time competition had been regarded as an economic rather than a biological phenomenon.

It was in the eighteenth century and in England that we first find any general recognition of the new rôle that commerce and the middleman were to play in the modern world. "Competition is the life of trade" is a trader's maxim, and the sort of qualified approval that it gives

[1] [By Robert E. Park and Ernest W. Burgess.

Robert E. Park was born Feb. 14, 1864 in Lucerne County, Penn.; Ph.B. (1887) University of Michigan, A.M. (1899) Harvard University, Ph.D. (1909) Heidelberg University; professorial lecturer in sociology (1913) University of Chicago. His works include: "Old World Traits Transplanted" (with H. A. Miller, Harper and Brothers, 1921); "The Immigrant Press and Its Control" (Harper, 1922).

Ernest W. Burgess was born at Tilbury, Ontario, May 16, 1886; A.B. (1908) Kingfisher College, Ph. D. (1913) University of Chicago; instructor, Toledo University (1912–13); assistant professor of sociology, University of Kansas (1913–15); assistant professor of economics and sociology, Ohio State University (1915–16); assistant professor of sociology, University of Chicago (1916–21); associate professor of sociology (1921–). His works include "The Function of Socialization in Social Evolution" (University of Chicago Press, 1916); "The Lawrence Social Survey" with Frank W. Blackmar (Department of Sociology, University of Kansas, 1916).

The selection above reprinted is from their "Introduction to the Science of Sociology" (Chicago: University of Chicago Press, 1921), pages 505–561 (parts omitted).]

to the conception of competition contains the germ of the whole philosophy of modern industrial society as that doctrine was formulated by Adam Smith and the physiocrats.

The economists of the eighteenth century were the first to attempt to rationalize and justify the social order that is based on competition and individual freedom. They taught that there was a natural harmony in the interests of men, which once liberated would inevitably bring about, in the best of all possible worlds, the greatest good to the greatest number.

The individual man, in seeking his own profit, will necessarily seek to produce and sell that which has most value for the community, and so "he is in this, as in many other cases," as Adam Smith puts it, "led by an invisible hand to promote an end which was no part of his intention." . . .

The freedom which commerce sought and gained upon the principle of *laissez faire* has enormously extended the area of competition and in doing so has created a world-economy where previously there were only local markets. It has created at the same time a division of labor that includes all the nations and races of men and incidentally has raised the despised middleman to a position of affluence and power undreamed of by superior classes of any earlier age. And now there is a new demand for the control of competition in the interest, not merely of those who have not shared in the general prosperity, but in the interest of competition itself. . . .

The more fundamental objection is that in giving freedom to economic competition society has sacrificed other fundamental interests that are not directly involved in the economic process. In any case economic freedom exists in an order that has been created and maintained by society. Economic competition, as we know it, presupposes the existence of the right of private property,

which is a creation of the state. It is upon this premise that the more radical social doctrines, communism and socialism, seek to abolish competition altogether.

COMPETITION A PROCESS OF INTERACTION

Of the four great types of interaction — competition, conflict, accommodation, and assimilation — competition is the elementary, universal and fundamental form. Social contact, as we have seen, initiates interaction. But competition, strictly speaking, is *interaction without social contact*. If this seems, in view of what has already been said, something of a paradox, it is because in human society competition is always complicated with other processes, that is to say, with conflict, assimilation, and accommodation.

It is only in the plant community that we can observe the process of competition in isolation, uncomplicated with other social processes. The members of a plant community live together in a relation of mutual interdependence which we call social probably because, while it is close and vital, it is not biological. It is not biological because the relation is a merely external one and the plants that compose it are not even of the same species. They do not interbreed. The members of a plant community adapt themselves to one another as all living things adapt themselves to their environment, but there is no conflict between them because they are not conscious. Competition takes the form of conflict or rivalry only when it becomes conscious, when competitors identify one another as rivals or as enemies. . . .

(*a*) *Competition and competitive coöperation.* — Social contact, which inevitably initiates conflict, accommodation, or assimilation, invariably creates also sympathies, prejudices, personal and moral relations which modify, complicate, and control competition. On the other hand, within the limits which the cultural process creates, and

custom, law, and tradition impose, competition invariably tends to create an impersonal social order in which each individual, being free to pursue his own profit, and, in a sense, compelled to do so, makes every other individual a means to that end. In doing so, however, he inevitably contributes through the mutual exchange of services so established to the common welfare. It is just the nature of the trading transaction to isolate the motive of profit and make it the basis of business organization, and so far as this motive becomes dominant and exclusive, business relations inevitably assume the impersonal character so generally ascribed to them.

"Competition," says Walker, "is opposed to sentiment. Whenever any economic agent does or forbears anything under the influence of any sentiment other than the desire of giving the least and gaining the most he can in exchange, be that sentiment patriotism, or gratitude, or charity, or vanity, leading him to do otherwise than as self interest would prompt, in that case also, the rule of competition is departed from. Another rule is for the time substituted." [1]

The plant community is the best illustration of the type of social organization that is created by competitive cooperation because in the plant community competition is unrestricted.

(*b*) *Competition and freedom.* — *Externality* in human relations is a fundamental aspect of society and social life. It is merely another manifestation of what has been referred to as the distributive aspect of society. Society is made up of individuals spatially separated, territorially distributed, and capable of independent locomotion. This capacity of independent locomotion is the basis and the symbol of every other form of independence. Freedom is fundamentally freedom to move and individuality is inconceivable without the capacity and the opportunity to gain an individual experience as a result of independent action.

[1] Walker, Francis A., "Political Economy," p. 92. (New York, 1887.)

On the other hand, it is quite as true that society may be said to exist only so far as this independent activity of the individual is *controlled* in the interest of the group as a whole. That is the reason why the problem of control, using that term in its evident significance, inevitably becomes the central problem of sociology.

(*c*) *Competition and control.* — Conflict, assimilation and accommodation as distinguished from competition are all intimately related to control. Competition is the process through which the distributive and ecological organization of society is created. Competition determines the distribution of population territorially and vocationally. The division of labor and all the vast organized economic interdependence of individuals and groups of individuals characteristic of modern life are a product of competition. On the other hand, the moral and political order, which imposes itself upon this competitive organization, is a product of conflict, accommodation, and assimilation.

Competition is universal in the world of living things. Under ordinary circumstances it goes on unobserved even by the individuals who are most concerned. It is only in periods of crisis, when men are making new and conscious efforts to control the conditions of their common life, that the forces with which they are competing get identified with persons, and competition is converted into conflict. It is in what has been described as the *political process* that society consciously deals with its crises. War is the political process par excellence. It is in war that the great decisions are made. Political organizations exist for the purpose of dealing with conflict situations. Parties, parliaments and courts, public discussion and voting are to be considered simply as substitutes for war.

(*d*) *Accommodation, assimilation, and competition.* — Accommodation, on the other hand, is the process by which the individuals and groups make the necessary internal adjustments to social situations which have been created

by competition and conflict. Eventually the new order gets itself fixed in habit and custom and is then transmitted as part of the established social order to succeeding generations. Neither the physical nor the social world is made to satisfy at once all the wishes of the natural man. The rights of property, vested interests of every sort, the family organization, slavery, caste and class, the whole social organization, in fact, represent accommodations, that is to say, limitations of the natural wishes of the individual. These socially inherited accommodations have presumably grown up in the pains and struggles of previous generations, but they have been transmitted to and accepted by succeeding generations as part of the natural, inevitable social order. All of these are forms of control in which competition is limited by status.

Conflict is then to be identified with the political order and with conscious control. Accommodation, on the other hand, is associated with the social order that is fixed and established in custom and the mores.

Assimilation, as distinguished from accommodation, implies a more thoroughgoing transformation of the personality — a transformation which takes place gradually under the influence of social contacts of the most concrete and intimate sort. . . .

The relation of social structures to the processes of competition, conflict, accommodation, and assimilation may be represented schematically as follows:

SOCIAL PROCESS	SOCIAL ORDER
Competition	The economic equilibrium
Conflict	The political order
Accommodation	Social organization
Assimilation	Personality and the cultural heritage

With man the free play of competition is restrained by sentiment, custom, and moral standards, not to speak of the more conscious control through law.

It is a characteristic of competition, when unrestricted, that it is invariably more severe among organisms of the same than of different species. Man's greatest competitor is man. On the other hand, man's control over the plant and animal world is now well-nigh complete, so that, generally speaking, only such plants and animals are permitted to exist as serve man's purpose.

Competition among men, on the other hand, has been very largely converted into rivalry and conflict. The effect of conflict has been to extend progressively the area of control and to modify and limit the struggle for existence within these areas. The effect of war has been, on the whole, to extend the area over which there is peace. Competition has been restricted by custom, tradition, and law, and the struggle for existence has assumed the form of struggle for a livelihood and for status.

Absolute free play of competition is neither desirable nor even possible. On the other hand, from the standpoint of the individual, competition means mobility, freedom, and, from the point of view of society, pragmatic or experimental change. Restriction of competition is synonymous with limitation of movement, acquiescence in control, and telesis, Ward's term for changes ordained by society in distinction from the natural process of change.

The political problem of every society is the practical one: how to secure the maximum values of competition, that is, personal freedom, initiative, and originality, and at the same time to control the energies which competition has released in the interest of the community.

TITLE I C: CONTRACT

CHAPTER VIII

UTILITY OF REQUIRING OBLIGATIONS TO BE PERFORMED [1]

RIGHTS TO SERVICES: METHODS OF ACQUIRING THEM

After *things*, *services* remain to be distributed, a kind of property sometimes confounded with things, and sometimes appearing under a distinct form.

There are as many kinds of services as there are ways in which man can be useful to man, either in procuring him some good, or preserving him from some evil.

In that exchange of services which constitute social intercourse some services are free, and others are compulsive. Those which are exacted by the laws constitute rights and obligations. If I have a *right* to the services of another, that other is in a state of *obligation* with respect to me; these two terms are correlative.

At first, all services were free. It was only by degrees that laws intervened to convert the more important into positive rights. It was thus that the institution of marriage changed into an obligation legally binding the

[1] [By Jeremy Bentham: born at London, England, Feb. 15, 1748; died at London, June 6, 1832. He attended Queen's College, Oxford (B.A., 1763: M.A., 1766). Later he was admitted to the bar at Lincoln's Inn.

His works include: "Introduction to the Principles of Morals and Legislation" (1789); "Fragment on Government" (1776); "The Constitutional Code" (1830); and "Rationale of Judicial Evidence" (1827).

The selection above reprinted is from his "Theory of Legislation" (translated from the French of Etienne Dumont by R. Hildreth: London, Trübner & Co., 1871) being pages 187–189 and 192–93 (parts omitted).]

hitherto voluntary connection between husband and wife, father and child. In the same way, the law, in certain states, has converted into an obligation the maintenance of the poor, — a duty which yet remains, among the greater part of nations, entirely voluntary. These *political* duties, compared to duties purely *social*, are like inclosures in a vast common, where a particular kind of cultivation is carried on with precautions which insure success. The same plant might grow on the common, and might even be protected by certain conventions; but it would always be exposed to more hazards than in the particular inclosure traced by the law, and protected by the public force.

Yet, whatever the legislator may do, there is a great number of services upon which he has no hold. It is not possible to order them, because it is not possible to define them, or because constraint would change their nature, and make them an evil. If it were attempted to enforce them by law, an apparatus of police and of penalties would be necessary, which would spread terror through society. Besides, the law could not act against the actual obstacles opposed to it; it could not put dormant powers into activity; it could not create that energy, that superabundance of zeal, which surmounts difficulties, and goes a thousand times further than commands.

The imperfection of law, in this respect, is corrected by a kind of supplementary law; that is, by the moral or social code — a code which is not written, which exists only in opinion, in manners, and in habits, and which begins where the legislative code finishes. The duties which it prescribes, the services which it imposes, under the names of equity, patriotism, courage, humanity, generosity, honor, and disinterestedness, do not directly borrow the aid of the laws, but derive their force from other sanctions, founded upon punishments and rewards. As the duties of this secondary code have not the imprint of the law, their fulfillment has more *éclat;* it is more

meritorious: and a superior degree of honor attached to their performance happily makes up for their deficiency in positive force. After this digression upon morals, let us return to legislation.

The kind of service which is most important consists in giving up some good in favor of another.

The kind of good which plays the greatest part in civilized society is money, — a representative of value which is almost universal. It thus happens that the consideration of *services* is often confounded with that of *things*.

There are cases where the service is exacted for the benefit of him who commands: such is the state of a master in reference to his servant.

There are cases in which the service is exacted for the advantage of him who obeys: such is the condition of the ward in reference to his guardian.

These two correlative states are the foundation of all the others. The rights which belong to them are the elements of which all the others are composed. The father ought to be, in some respects, the guardian, in others the master of the child; the husband ought to be, in some respects, the guardian, in others the master of the wife. These states are capable of a constant and indefinite duration, and form domestic society. The rights which ought to be attached to them are discussed in subsequent chapters.

The public services of the magistrate and the citizen constitute other classes of obligations, of which the establishment belongs to the constitutional code.

But beside these constant relations, there are transient and occasional relations, in which the law may exact the services of one individual in favor of another.

The means of acquiring rights to services — that is, the causes which determine the legislator to create obligations — may be referred to three heads: — 1st, *Superior need*: 2d, *Anterior service*: 3d, *Pact* or *Agreement*.

PACT OR AGREEMENT. - *The intervention of a promise between two persons with the understanding that a legal obligation attaches to it.*

Everything that has been said of consent in relation to the distribution of property applies to consent as respects the interchange of services. There are the same reasons for sanctioning this interchange of services as for sanctioning the interchange of property. Both rest on the same fundamental axiom, but every alteration import: an advantage. Bargains are not made except from the motive of utility.

The same reasons which annul consent in the one case annul it in the other — Concealment, fraud, coercion, subordination, erroneous idea of legal obligation, erroneous idea of value, incapacity, pernicious tendency of the bargain, though without fault in the contracting parties.

We need not enlarge upon those subsequent causes which produce the dissolution of agreements. — 1st, *Accomplishment*; 2d, *Compensation*; 3d, *Express or tacit remission*; 4th, *Lapse of time*; 5th, *Personal impossibility*; 6th, *Intervention of a superior inconvenience*. In all these cases, the reasons which caused the agreement to be sanctioned exist no longer; but the two latter relate only to the literal specific accomplishment of the bargain, and may still leave room for compensation. If in a mutual bargain one of the parties only has fulfilled his part, or if his part be the more nearly performed, a compensation from the other will be necessary to reestablish the equilibrium.

It is enough to point out the principles without dwelling on the details. Particular arrangements must vary according to circumstances. However, if we establish firmly a small number of rules, these particular arrangements will not interfere with each other and will all be arranged in the same spirit. These rules are so very simple that they need no development.

1st. Avoid producing disappointment.

2d. When a portion of that evil is inevitable, diminish it as much as possible by dividing the loss among the parties interested in proportion to their means.

3d. Take care in the distribution to throw the greater part of the loss upon him who, by attention, might have prevented the evil, so as to punish his negligence.

4th. Avoid especially producing an accidental evil greater than disappointment.

CHAPTER IX

IMPROVIDENT CONTRACTS [1]

Amongst the many financial difficulties of the wage-earner two are preëminent at the present moment; the provision for emergencies and the equalization of his income. They are difficulties alike in their nature and calling for very similar solutions, and leading also when unsolved to the same financial embarrassments; but it is only in comparatively recent times that the latter is coming to be recognized as a serious problem. The necessity for providing against the inevitable "rainy day" has existed from time immemorial, and all sorts of expedients and machinery have been devised to meet the need. The necessity of spreading out an intermittent income over the whole year has only recently assumed large proportions among wage-earners, and they are as yet ill prepared to meet it and to adapt themselves to the inconveniences of the long vacation. Such expedients as they do resort to are for the most part obvious enough, but clumsy and expensive, and to my thinking altogether on the wrong lines. Moreover they have a tendency when freely indulged in — as in large towns — to supersede the older and wiser methods of providing against emergencies. A man who finds that he can tide over slack times without troubling himself to make provision beforehand, naturally yields to the unconscious inference that he will be able to get through other difficulties in the same way; and the

[1] [By Helen [Dendy] Bosanquet [Mrs. Bernard Bosanquet]. The selection above reprinted is from her "The Standard of Life" (London: Macmillan & Co. Ltd., 1906), being pages 196–218 (parts omitted).]

tendency is for him to place his whole financial position upon a different and less sound basis.

There are, of course, as every economic unit soon finds out, two ways of meeting financial exigencies; two ways, that is, in addition to the obvious but not always possible one of working. We can anticipate our difficulties, either in general or in detail, and sacrifice something of the present to make provision against them; or we can wait until they come and then draw upon our future resources — sacrifice the future to provide for the present. It is of this latter course, and of the divers ways in which it may be achieved, that I have now to speak; and also of its efficiency as compared with the former.

Of course the uncertainty of the future really tells both ways from a rational point of view; and it must be argued as against credit that while our present resources are known our future resources are not, that we *may* be piling up a burden for a time of special misfortune, and that in any case we increase it by *paying* instead of *receiving* interest. But from an *ir*rational point of view the uncertainty tells almost entirely in the direction of sacrificing the future; where the reasoning faculties are undeveloped the psychological pressure is all in favor of the present. A very small want of to-day looms large enough to obscure a great necessity in the future, and it is useless to point out how the price of a few pots of beer would pay the sick-club subscription; arithmetic has no power over a thirsty soul when drink is within reach. Nor can the vision of future sickness overcome the assuredness of present health and strength. . . .

Thus it comes about that there is a powerful instinct towards the credit system of meeting emergencies and equalizing incomes, and many and ingenious are the devices by which a working-man may now forestall his future. . . .

Of borrowing there may be said to be three typical forms. There is first the regular business transaction with the ordinary loan society or money office; "money lent on personal security in any amount." How much of this goes on one may roughly estimate by the number of loan offices which flourish in or around working London, and by consulting the records of the County Court. There are eighty-two loan offices in the *London Directory*, and by far the greater number of these are in the poorer neighborhoods. The ordinary rate of interest charged is 10 per cent, but this is often doubled or more by the system of fines and charges. Preliminary charges are made for "inquiries" into the character or solvency of the borrower, and these have to be paid whether the loan is granted or not. Then a charge is made for every letter written, and a fine imposed for every delay in repayment. I am told that the more respectable firms prefer to charge 20 per cent right out, and have nothing to do with extras. This is considered a fair rate of interest, and a loan office is likely to win its case in court unless it has charged above 25 per cent; higher than that the judge is apt to consider unreasonable. As a matter of fact this does not seem to be more than a fair cover for risk, if we consider that the pawnbroker charges 24 per cent, and has perfect security; yet the pawnbroker is regarded as a respectable tradesman, or even philanthropist. . . .

To give some idea of the amount of this borrowing that goes on: there were dealt with in the Shoreditch County Court last year 12,600 cases for amounts varying from 1s. 6d. to £50; these, of course, covered very various kinds of debts, rent, general shops, tallyman, etc., but loans formed a very large number, and were frequently for such a small amount as to seem hardly worth collecting.

The subject of pawning offers much food for reflection. It might be fairly argued that in pawning a man does not

really get into debt at all, but merely exchanges his goods for a sum of money considerably less than their real value. If indeed, as may no doubt happen, there is little or no prospect of redeeming, the man is merely selling his goods; living upon his capital instead of drawing upon his future income. But in the majority of cases there is every intention to redeem; and in East London it is a recognized function of clothing and furniture to serve at need as a machinery for raising money, *i.e.* for forestalling future earnings.

It not infrequently happens, however, that the goods are pledged without any definite intention of redeeming, and then, of course, the object of the pawner is to get as near full value as may be. Why not sell at once? it may be asked; but it is always more difficult to sell at a moment's notice unless at a ruinous sacrifice; moreover, when you have pawned you still have a marketable value in the tickets. . . .

The intention to redeem converts the transaction into a burden which is practically a debt, all the more dangerous because it tends to become periodical. Many an East End family is hampered all through a summer of good work by the struggle to gather round them again the home with which they parted last winter; only for it to be dissipated again as soon as work falls off. It is in cases like these that the pawnbroker is generally regarded by benevolent outsiders as a guardian angel, ready to come to the rescue at a crisis. "What would the poor people have done if they could not have gone to the pawnbroker? they must have starved," we are often told. But experience or a little reflection shows us that every summer the poor people pay away in redeeming and interest, enough to carry them through the winter without any assistance from the pawnbroker, and that but for the vicious habit of drawing upon the future they might with less hardship to themselves get through the winter and have the use of

their furniture into the bargain. The pathetic absurdity of the situation finds its climax in the Monday to Saturday pawning, which has become so common and degrading a custom. . . .

When we come to the credit which takes the form of not paying, the varieties are, of course, co-extensive with the purchases made by the debtor; but certain of them are more general and therefore more important than the others. First among them is the general shop, and other tradespeople to a smaller extent. The general shop covers all the necessary expenditure of bad times from coals to candles, with the exception indeed of butcher's meat, and it often substitutes for that in the form of bacon and eggs. It is, therefore, at the general shop that the debt accumulates, and the owner of the shop practically supports many of his customers for considerable periods of the year. . . .

Next in importance to the general shop is the landlord, and large is the extent to which he is drawn upon for free lodging. Apart from the regular "besters," who will pay perhaps one month's rent in six, there are many who habitually let the rent run in bad times, and pay it up gradually as things improve. It is comparatively seldom, however, that they get it all paid before the next bad time, and in this way there comes to be a sort of "rest" which gets wiped out by a removal, but accumulates if the family stays on until it reaches pounds. . . .

When board and lodging can both be charged upon the future a man's position is assured; but there are ways of dealing with less urgent needs which are quite as prevalent. He need not wait for his furniture until he has money to pay for it; the hire system will advance it to him, at a terrible cost it is true, but then that cost is charged upon the future. Articles concerning the purchase of which he would think twice had he to pay the money down, find their way into his home and cost as much to keep as an additional member of the family. The drain upon the

weekly income soon comes to be intolerable, and the forfeiture of past payments preferable to the continued strain. To furnish on the hire system is perhaps as unsatisfactory a way of housekeeping as can be devised; even the furnished lodging has more of reality about it.

A still more insidious exponent of credit is the tallyman, who finds an occasion for exploiting the future of his victims in every conceivable article, both of necessity and luxury. Of course his success depends upon the skill with which he can magnify the delights of immediate acquisition, and minimize the pains of future payment; it has very little to do with the real value of the article, which is often discarded or stale long before the payments are completed. All the genuine delight of purchase is in this way spoiled, and it becomes a mere burden, rashly undertaken and evaded as often as possible.

Occasionally the evil tends to remedy itself in curious ways when it has been carried to excess in some definite direction. I have already noted the mutual loan societies, which had their origin in the necessity of paying rent, and my attention has been called to a similar organization in connection with funerals. Somewhat to my surprise I found that ten or twenty years ago the extravagance in this direction was even worse than it is now. Undertakers were much more ready then to give credit for "high class funerals," and people entirely without means would indulge in mutes, footmen, feathers, and pall — "the whole show" — and incur debts of £25 or more which they were years in getting rid of. Unless, indeed, they repudiated it altogether; and this happened to such a large extent that undertakers have become a cautious race. The extreme of credit now is a good funeral for £8 or £10, of which £5 must be paid down. Moreover, burial clubs have been instituted; the undertaker collects payments, and for about a shilling a month undertakes (giving a new meaning to his name) to bury any member

of a family who dies within the year. At the end of the year the balance is divided out, and in this way, by paying 12s. a year, you may, if you are lucky, have three or four funerals as well as a dividend of 6s. or 7s.

But even this gambling sort of thrift makes slow progress amongst a people so tempted on every hand to forestall their means. A man learns to consider it a little thing to be in debt for rent and food, and almost meritorious to possess furniture and clothing for which he has not yet paid; the consequence is that in one alone of the ten county courts of London, 12,600 were sued for debt last year; in other words, about every third or fourth family was insolvent; not merely living on their future, but having pawned that future so deeply that they could no longer get credit for it even in East London, the very paradise of indebtedness.

Taking it then that the prevalence of indebtedness amongst the working-classes in London is established, I want to consider briefly its bearings as a moral and an economic phenomenon. Is it sufficiently analogous to the prevalence of credit in the commercial world, to be a source of congratulation to the community? Does it, in other words, enable the working-class to carry on operations with a freer hand, and thus help it to increase its wealth and raise its standard of living? The primitive agriculturist learns by hard experience that last year's harvest is the only legitimate source of food; have we, in our more complex society, really got beyond that elementary truth? It is possible to argue that in a community with so large a surplus available for luxury it is legitimate, and even desirable, to divert some of that surplus into a more productive course by advancing it to the laborer in the shape of food, clothing, and furniture. It might be even urged that although the laborer did not repay, the wealth of the community would be well spent in increasing the comfort of its working-class.

I suppose the ultimate criterion between good and bad credit is whether it directs capital into more or less productive channels. When the borrower is able to make use of his loan in such a way as to replace it with due profit at the end of his operations, then the transaction is justified. But in what sense is this true of the great mass of indebtedness of which we have been speaking?

Take rent as a typical instance. The indebted class *never* repays the loan (if loan we are to consider it) in full; much less is there any profit reaped except in so far as it profits by not-paying. Of course in the long run the deficit is made up to the landlord, who is no more of a philanthropist in his business than is the pawnbroker; he covers his risk by charging high rents all round, and thus it comes to pass that those who pay are just those who *don't* have credit, and therefore benefit nothing.

In the case of the general shops it is the same with a difference. Here, again, high prices cover some of the risk, but customers may choose between them and cash shops. It is the general shops themselves which suffer most in the long run, and taking into consideration the enormous number of small failures in that trade, I seriously doubt whether on the whole it is a remunerative one.

Let us look at this moral effect a little closer. Under the best of circumstances a man who is in debt is only half a man; his future is not his own. But the man who has to submit to weekly dunning from professional debt-collectors, whose clothing is for five days out of seven in the pawnshop, whose household goods may at any moment be confiscated, and whose landlord is always meditating the advisability of evicting him, has sold himself into a slavery from which there is no escape but flight. He has literally no alternative but indifference or despair, and it is these qualities which chiefly characterize the class. Thrift is made an impossibility, for apart from the facilities

for satisfying all desires without previous effort, how can you save with your creditors on the watch for every penny? Many a shilling is recklessly wasted because if not spent it will only go to the debt-collector; and it does not take long for the energies of the debtor to be diverted from the effort to repay to the effort to evade his creditor. I have known a woman move herself and family and belongings five times in order to avoid the payment of 1s. a week for a sewing-machine; as soon as she is tracked she makes another flitting, and will continue to do so until the creditor abandons the pursuit.

There is something also almost incompatible with self-respect in the scenes into which people are brought by their indebtedness. Go into the pawnshop and watch the man unroll the bundles as they are brought in, chaffing the women on the quality of their clothing, and holding some well-worn garment up to ridicule; see him take the wedding-ring from some poor woman, try it on the counter and sniff contemptuously that "there ain't much gold in that." Or go into the county court, where the very air seems tainted with degradation, and look at the faces of the throng of debtors lounging about till their turn comes. Some are anxious and troubled, the majority indifferent or contemptuous; there is no more sense of responsibility about any of them than there is about the out-patients in a hospital waiting room. The majority of them would only use their solvency to get into debt again. Indebtedness is not an incident with them; it is their plan of life.

Would the working-class on the whole benefit if an Act were passed making small debts irrecoverable at law? I am not prepared to answer it decisively. The arguments against it are obvious, and it has been strongly urged upon me that the poor would suffer greatly in bad times by the inevitable withdrawal of credit by the general shops, and the inability to borrow a few pounds in emergencies. But there are two forms of credit which would remain practi-

cally unaffected by such an Act, and which involve, to my thinking, less harm than any of the others. The first of these takes the shape of an advance of wages from the employer on special occasions of misfortune. There is no fear of such indebtedness becoming chronic, or of its being incurred for trivial reasons; the loan is repaid automatically by deduction from future wages, and in full, but does not involve any burden of interest or fines. Moreover, it is made on the strength of a personal relationship, and brings with it no degrading associations.

The second kind of credit is similar in that the loan is made on the strength of personal knowledge and confidence, and does not rely upon legal proceedings for recovery. The most prevalent form of this in London is that practiced by the costermongers; and in smaller places we find the general shops acting on what is practically the same basis. They rely, that is, on personal knowledge of their customers and their circumstances, and not at all upon legal remedy. The chief hindrance to this personal knowledge in London is the mobility of its inhabitants, and this would decrease enormously with the decrease of credit.

But the effects of legislation are difficult to foresee; I am told that a great encouragement to bad debts has been given by the Married Women's Property Act, which has opened up new possibilities of evading liabilities. It is conceivable that a check to small debts would only conduce to larger ones; and in any case such an Act could do nothing to remedy the evils of the pawnshop. My only conclusion is, therefore, that the amount and facility of credit (or as I should prefer to call it — indebtedness) among the working classes is an almost unmixed evil.

CHAPTER X

CONTROL OF CONTRACT BY LAW[1]

FUNDAMENTALLY all these theories of distributive justice may be grouped under three heads, though there are innumerable variations under each of the three. The first may be called the aristocratic theory, the second, the socialistic theory, and the third, the democratic or liberalistic theory. By the aristocratic theory is meant the theory that the good things of this world belong more particularly to one distinct group or class than to another, that these, the elect, have a prior claim over all others to the resources of the earth and the products of industry. By the socialistic theory is meant the theory that wealth ought to be distributed according to needs; and by the democratic or liberalistic theory is meant the theory that wealth ought to be distributed according to productivity, usefulness, or worth.

[1.] The aristocratic theory is the most difficult of the three to discuss adequately, because no one definitely affirms it. Nevertheless, there are many who tacitly

[1] [By RICHARD T. ELY: born at Ripley, N. Y., April 13, 1854. He has been professor of political economy at the University of Wisconsin since 1892.

His works include: "French and German Socialism in Modern Times" (1883); "Taxation in American States and Cities" (1888); "Introduction to Political Economy"; "Outlines of Economics" (enlarged edition, 1918); "Monopolies and Trusts"; "Labor Movement in America" (1883); "Socialism and Social Reform" (1894); "Studies in the Evolution of Industrial Society" (1903); "Property and Contract in Their Relation to the Distribution of Wealth" (1914); "Elementary Economics" (new edition, 1917).

The selection above reprinted is from his "Property and Contract" (N. Y., The Macmillan Co., 1914), being (vol. II) pages 561–732 (parts omitted).]

assume it, and show by their attitude that they accept it in one form or another. Moreover, it is the theory upon which the civilized world has actually proceeded during a considerable period of its development. . . .

As with all political and social theories, the justification or condemnation of the aristocratic theory of distribution must be determined by its results viewed in the light of the circumstances of time and place. It can scarcely be doubted that this theory, as practiced in the early stages of civilization, was a powerful factor in promoting the first steps of social development. Even the crudest case imaginable, that of the primitive despot, — the strong man who by the strength of his arm and the weight of his club subjugated his neighbors to his will and robbed them of their substance in the form of tribute, — even he may have been an unconscious and unmeritorious agent of progress. Fundamentally like this primitive form of despotism is every form of aristocracy, autocracy, or monarchy, though sometimes religious fear or a superstitious belief in some form of divine right is combined with physical force as a means of class domination. Though all such things seem odious in the light of our present civilization, yet to the scientific observer who neither praises nor condemns they seem to have been factors essential to certain stages of progress. One or two familiar principles will help to make this clear.

It is a well-known fact, for example, that grass tends to grow as thick as the conditions of soil, heat, moisture, and the presence of enemies will permit. If for any accidental reason the grass in a certain plot of ground should be thinner than these conditions will permit, its power of multiplication is so great that it will speedily increase in density until the equilibrium is restored. Nature seems everywhere intent on preserving some such balance or equilibrium as this, for the same rule applies to all forms of life, including the human species, at least in its lower

stages of development. Whenever any branch of the human species succeeds in achieving something more than its own maintenance, that achievement may be called a storing of surplus energy, for no such result is possible except where nature's process of dissipation is arrested, — that is, where human energy can be used for other purposes than its own sustenance. . . .

Now, one of the most effective, and probably the earliest, of the agencies for the storing of human energy was the despot. When that primitive bully subjugated his neighbors and demanded a share of their produce as tribute, he simply reduced the amount of subsistence left for them. If they could not live on what remained, nature had a way of restoring the equilibrium by thinning them out. But the despot himself would be in possession of a surplus. The chances were that he would waste this surplus in riotous living, thus himself becoming an agent of dissipation. But in a few cases, either through the surfeiting of his primary appetites, through the substitution of vanity for greed, or through the fear of things dark and mysterious, the whim seized him to build himself a tomb, a palace, or a temple, or to maintain priests to save his soul, musicians to sing his praises, or artists to represent him in heroic attitudes. In such cases the race had done something more than provide for the primary appetites of hunger, thirst, and sex. This is, in substance, the beginning of every ancient civilization. . . .

Odious as despotism is, it is probably justified by such results as these. The grandeur of ancient Egypt was the result of the exploitation of the masses and the embodiment of their energy in permanent forms — energy which would otherwise in all human probability have been dissipated in the manner common to all life. The religious philosophy of the Hebrews could hardly have been developed in the absence of a priestly class supported by tithes. The brilliant civilization of Greece was based on slavery,

and the magnificence of Rome upon the exploitation of conquered peoples. Possibly none of these results were worth what they cost, for the cost was oppression in one form or another, and oppression is always hateful. But whatever the cost, the results *were* achieved, and if we are called upon to choose between the oppression which achieves such results and the primitive communism under which wealth is dissipated and life kept down at a low level because it is all at the mercy of the most gluttonous consumers and the most rapid breeders, we could not go so very far wrong if we were to choose oppression. . . .

Vastly more important than the building of magnificent tombs, temples, and palaces, or the development of esoteric philosophies and literatures, is the development of a high standard of living among all the people. This, of course, is something that no form of oppression or class domination can do. The civilization built up under these forms is always and everywhere a civilization under which the few are lifted on the backs of the many into a high plane of existence. Though this is doubtless better than no civilization at all, yet it does not satisfy our ideals. The social problem of the future is to work out a system under which all the people may, without constraint or oppression, each one remaining the master of himself, live on a high level. It is needless to point out that such a result has not yet been achieved, and that it furnishes a prospect so pleasing that such a scheme as socialism seems like a pitiful makeshift in comparison.

The effort to maintain a high standard, or any standard at all above the minimum of subsistence, toward which as an equilibrium point humanity in a natural state tends, has led to some interesting expedients, some of them purporting to be democratic, but all of them departing essentially from the democratic principle. . . .

A somewhat more advanced expedient for accomplishing the same purpose, though a distinctly aristocratic one, is

the system of primogeniture. The fortuitous circumstance of being the eldest son determines in this case who shall enter most fully into the benefits of civilization. . . .

In the same class of expedients for maintaining standards belongs the trade union policy of the closed shop. . . .

In this connection appears the only scientific basis for the doctrine of the minimum wage. It sounds well to say that no laborer ought to receive less than six hundred dollars a year. Certainly that sum is none too large. But this leaves unanswered the question what to do with those whose services are not worth six hundred dollars a year. Enforced colonization, the multiplication of almshouses, or a liberal administration of chloroform would be necessary to dispose of a considerable number of our population. . . .

Though it is evident that modern society will adopt none of these heroic measures, yet it is interesting to speculate, in a purely academic way, upon the results of the principle of the minimum wage thus severely enforced. In the first place, it is apparent that such a policy would tend to weed out the less competent members of the community so that, in the course of time, there would be none left whose services were not worth at least the minimum wage. In the second place, it can scarcely be doubted that after that was accomplished, the community would be vastly superior to the present one, for it would be peopled by a superior class of individuals, and the general quality of the population would not be deteriorated by the human dregs who now form the so-called submerged element. Nevertheless it would be inherently inequitable because it would sacrifice one part of the population in the interest of the other, though it might not be more inequitable than nature herself, who ruthlessly sacrifices the weak in favor of the strong.

[2.] "From every one according to his ability, to every one according to his needs," is a formula which fairly well

summarizes the older socialistic theory of distribution. As a theory this has two distinct merits. In the first place, if we could insure that every one would produce according to his ability, we should have the maximum of wealth to distribute. In the second place, any given amount of wealth would yield the maximum amount of utility to the consuming public if we could manage to distribute it according to needs. That is to say, with a given fund of wealth to be distributed and consumed, more satisfaction will be afforded, more wants gratified, by having it distributed and consumed in proportion to needs than when it is distributed according to any other possible plan. If, for example, A has so many apples that any one of them is a matter of trifling concern to him while B is hungry for apples, the sum total of the satisfaction of this community of two men would be increased by A dividing with B in such proportion that their needs would be equally well satisfied. The formula, "From every one according to his ability and to every one according to his needs" is therefore a perfectly sound one in so far as it relates to individual obligation. . . .

But it is one thing to say that the individual ought to do thus and so, and quite another to say that the state ought to take the responsibility of making him do so. There are many things which the individual ought or ought not to do which it would be futile for the state to try to make him do or to leave undone. . . .

Now the problem of distribution is essentially a problem of public regulation and control, and not a problem of voluntary individual conduct. The question is not what the individual ought in conscience to do, but what the state ought, by its laws and institutions, to compel him to do; not whether the individual ought to increase his wealth beyond certain bounds, but whether the state ought to allow him to; not whether he ought to use his private possessions for his own gratification, but whether

the state ought to allow him to have any private possessions at all. These two questions are logically so distinct that it is amazing how persistently they are confused by socialistic writers, especially by those known as Christian Socialists. The socialistic theory of distribution according to needs is not a mere preachment, a mere appeal to the individual to regard himself as a steward entrusted with the management of a portion of the wealth of the world; it is an appeal rather to the force of law; it proposes that men shall consume wealth according to their needs, not because they want to, but because the law allows it to them in that proportion.

An obvious difficulty with the plan to distribute wealth by force of legal authority in proportion to needs is the utter impossibility of comparing the relative needs of different individuals. If there were no other complications, the mere fact that needs are largely the product of historical conditions would make the problem hopelessly confusing. We are, for example, accustomed to assuming that the needs of the business and professional classes are larger than those of the laboring classes; but nothing could be more untrustworthy than this assumption. The mere fact that, under the present social arrangement, the business and professional classes have been accustomed to having more than the laboring classes, makes it seem necessary that they should continue to have more; but this seeming necessity would absolutely disappear in a single generation of equal distribution. Among all but the very poorest classes the cost of living is due not so much to the cost of things which are desired for their own sakes as to the things which are desired because they are possessed by others with whom one associates. If, then, one's associates, — those in the same social class with oneself, — consume largely, one feels under the absolute necessity of living up to the same standard. But a social arrangement under which all one's associates were re-

duced to a smaller average income would correspondingly reduce one's own wants, after one had become accustomed to the new condition. Another assumption of the same kind is that education and culture increase one's needs. The real fact is that education increases one's earning capacity and introduces one into a social class where consumption is more liberal because incomes are larger. This creates the appearance of larger needs. If we could divest the question of such complications and examine it apart from the presuppositions created by the existing system of distribution, we should probably find that the needs of the cultured man are less than those of the uncultured. What is culture for if it does not give a man more resources within himself and render him less dependent upon artificial and therefore expensive means of gratifying the senses?

Taken altogether the proposal to distribute wealth in proportion to needs would necessarily resolve itself into equality of distribution, on the assumption that all members of the community have equal needs. This assumption, though obviously untrue, is much nearer the truth than any other workable assumption. That is, it is much nearer the truth to say that all men have equal needs than it would be to say that the needs of one class are, in a definite proportion, greater than those of another class, for the chances would be exactly equal that the proportion would have to be reversed. Though it is extremely unlikely that A's needs are exactly equal to B's, yet it would be much safer to assume that than to assume that A's were fifty per cent greater than B's. It would be quite as difficult to determine the relative wants of different individuals as it is to determine how long they will live. The latter difficulty forces upon life insurance companies the necessity of constructing life tables. Though it is extremely unlikely that two men, A and B, being of the same age, class, and state of health, will live exactly the

same length of time, yet such an assumption is much safer than that either one will live longer than the other by a definite period.

Under the system of distribution according to needs, the only distinctions which could possibly be made would be certain obvious ones based upon age, sex, etc.; and even these would be arbitrary and of uncertain value. Can we, for example, safely say that a child's needs are less than those of an adult? It seems doubtful. Are a woman's needs less than a man's? The weight of the evidence seems to be to the contrary, though under present conditions men spend more on themselves than women do, mainly because they have the power to do so and choose to exercise it. The man who is cock-sure on all these questions is scarcely the man to whose judgment any of us would like to entrust a matter of such vital concern as the distribution of wealth.

Even more difficult than the determination of the relative needs of different individuals is that of determining their relative ability. Physiological psychology has not yet discovered the method whereby the quality and capacity of a man can be tested, measured, and quantitatively expressed. Until that is done, we must depend upon the individual himself to demonstrate his own ability. To this end we must give him an open field for the exercise of his talents and make the normal consequences of efficiency as agreeable as possible to him, at the same time making the normal consequences of his own inefficiency, uselessness, and harmfulness as disagreeable as possible to himself. The individual who will not be spurred on to do his best by these conditions could scarcely be made to do any better except under the whip of a taskmaster.

In view of the utter futility of trying to determine by legal process either the relative needs or the relative abilities of different individuals, the formula "From every one according to his ability and to every one according

to his needs" becomes a formula for the preacher of righteousness, whose appeal is to the individual conscience, rather than for the legislator, whose appeal must be to legal sanctions. In strictness, the formula ought to be modified to, "Let every one *produce* according to his ability and *consume* according to his needs." The individual whose moral development will cause him to respond to such an appeal to his conscience, his sense of duty, or his desire for social esteem, can be reached as effectually under the present system of distribution as under any other, while he who will not respond to such an appeal could not be reached under any system except slavery. Those who, without compulsion but from a sense of duty or for the sake of the good opinion of their fellows, are willing to produce according to their ability and to consume according to their needs, furnish no problem in distributive justice for the legislator. But there is a class, large or small as the case may be, who need the stimulus of a prospective reward as an inducement to labor. Make their income independent of their exertions, and their exertions will cease or become less strenuous; but make their income to depend directly upon the value of their services to the consuming public, and they will be spurred on to their best endeavors. How to deal with this class is the problem in distributive justice which the legislator has to solve. It is the opinion of most men whose judgment carries weight that this class includes the vast majority of any community. . . .

This brings us to the exceedingly pertinent question, What difference does it make, after all, who owns the wealth, *provided* it is wisely and benevolently administered? . . .

The answer is, It makes no difference: but the proviso is too large to be safe. Under the extremest form of concentration imaginable, and under the widest possible dissemination of wealth, the average citizen would be

equally well off *provided* the wealth of the community were equally well administered. It is quite the same with political authority. Despotism and democracy are equally good *provided* they are equally well administered.

If monarchs had been uniformly wise and benevolent there would never have been any reason for democracy. But the world has learned that monarchs are seldom either wise or benevolent, and therefore it has drifted toward democracy. It is not safe to entrust too much power to any individual, for the chances are that he will abuse it. The world has learned that it is safer for the people to retain political power in their own hands, — that in spite of the weaknesses of democracy the chances of bad government are materially less under this form than under any form of concentrated political power. This is the one and only reason in favor of democracy, but it is quite sufficient. Similarly, there is only one reason in favor of a wide diffusion of wealth, and that is an entirely sufficient one, viz., that we cannot safely trust too much economic power in the hands of one individual. Though a wise and benevolent economic despot, in whom the law vested the ownership and control of a vast amount of wealth, *might* administer that wealth in such a way as to benefit the people as much as though they owned individual fractions of it themselves, yet the chances are that he will do nothing of the kind. Human nature being what it is, the chances are very much in favor of his appropriating a considerable share of the annual product of the community to his own particular uses and wasting it in riotous living, in ostentatious consumption, or, more disastrous still, in spoiling his family and unfitting them for usefulness by accustoming them to ease and luxury. It is therefore quite important that laws and institutions should be devised which will secure a wide diffusion of wealth — fully as important as it is that there should be a wide diffusion of political power.

Now there are two widely distinct notions as to what constitutes a wide diffusion of wealth. One is that the ownership of the productive property be concentrated in the hands of the state and administered by public officers, only the income or the consumable wealth being diffused among the individual citizens. This is the socialistic ideal. The other is that the ownership of the productive wealth itself should be widely diffused. This being the case, the income or consumable wealth would of necessity also be widely diffused. This is the democratic or liberalistic ideal. It is the opinion of the liberal school that this system gives greater plasticity and adaptability to the industrial institutions of the community than any form of public ownership and operation can possibly give. Socialistic writers have too hastily assumed that this ideal is unattainable, and that we are really shut up between the devil of plotocracy and the deep sea of socialism. Let us not thus despair of the republic. Once upon a time, according to an old fable, a man placed a heavy load upon the back of his camel and then asked the beast whether he preferred going up hill or down hill, to which the camel replied, "Is the level road across the plain closed?" Possibly society is not, after all, confined to the two alternatives of plotocracy and socialism.

[3.] The democratic or liberalistic theory puts every one upon his merits. The worthless and the inefficient are mercilessly sacrificed, the efficient are proportionately rewarded. It frankly renounces, for the present, all hope of attaining equality of conditions and confines itself to the effort to secure as speedily as possible equality of opportunity. . . .

By equality of opportunity is meant a free and equal chance for each and every one to employ whatever talents he may possess in the service of the community, and in seeking the rewards of his service, and a similarly free and equal chance for all other members of the community to

accept or reject his service according as its quality and its price please or displease them. This is about as different as anything could possibly be from equality of personal ability, or equality of wealth or economic conditions. It simply means that such opportunities as exist for earning a living or acquiring wealth shall be open to all alike *so far as legal and social restraints* are concerned. It does not mean that the individual is to be freed from the limitations of his own nature, physical or mental. The lame, the halt, and the plethoric would have little chance of winning in a race where the prize was to the swift, yet there would be equality of opportunity provided the race was free to all and without handicap, and provided the course was broad and open. Similarly, the dull, the stupid, and the lazy would have little chance of winning in a contest where the prize was to the keen, the alert, and the strenuous, yet there would be equality of opportunity, provided the competition were open to all without legal discrimination or political favoritism. Equality of opportunity requires that such avenues to wealth as are closed by law, shall be closed to all alike, and such as are open shall be open to all alike. To the individual whose genius fits him preëminently for the work of the burglar a law against burglary may seem like a discrimination, for he is thus forced into some other occupation for which he considers himself less fit. For the same reason the confidence man, the trust promoter, the speculator, and every other individual who employs his wits in acquiring wealth in non-serviceable occupations would look upon necessary legal restrictions as discriminations; but in spite of these restrictions there would be equality of opportunity provided they were enforced upon all alike.

Equality of opportunity means liberty, it is true, but it means liberty in the performance of service and in seeking the rewards of service. It is not held, and it never has been held by the recognized expounders of the doctrine

of liberty, that it meant absolute freedom from legal restraint. The very conditions of social life require that there should be restraints upon the non-serviceable and the injurious activities of individuals. The ideal of liberty is fully realized when every individual is absolutely free to seek his own interest or follow his own inclination in every possible way which is pleasing to himself and not harmful to the rest of society. Therefore, to say that a certain man's fortune is the reward of superior skill, shrewdness, or industry is no justification at all unless it is shown that that skill, shrewdness, or industry was usefully directed. If this condition is omitted, the wealth secured by the burglar, the counterfeiter, and the confidence man are all justified, for it takes skill, shrewdness, and industry to succeed at any of these callings. In short, the word *service*, and not intelligence or industry, is the touchstone by which to distinguish those opportunities which the principle of liberty requires should be open to all from those which should be closed to all. The principle of liberty is a part of the democratic or liberalistic theory of distributive justice. . . .

Liberty to pursue one's own interest in one's own way so long as the way is a useful one gives rise to what is known as competition, which can only be defined as rivalry in the performance of service. Production is service. Wherever two or more men are seeking their own interest in the same kind of service, or, more accurately, are seeking to obtain the reward for the same kind of service, there will normally be rivalry among them. This rivalry sometimes breeds illfeeling, and generally breeds discontent on the part of those who are beaten. It also involves a certain amount of wasted effort, because producers frequently devote a part of their energies to the work of defeating their rivals by other methods than that of superior productiveness. In a few glaring cases, these predatory methods become the characteristic ones, and the effort

to beat one's rivals by superior productiveness is almost lost sight of. But these are really the exceptional cases and do not actually characterize the competitive system as a whole. In the great fundamental industries like agriculture — which is the greatest industry in every country — and in well-established lines of manufacture like the textiles, efficiency in production is still the principal factor in success. It is only in the limited field of "high finance" that mere shrewdness without serviceableness becomes a relatively important factor. Such fields of business activity are trifling and insignificant in comparison with the great industries which occupy the bulk of our population. However, it is always the exceptional case, as it is the exceptional event, which arrests the attention. . . .

In spite of the glaring weaknesses of the competitive system, and its undoubted waste of effort, it is the belief of the liberal school that it is the most effective system yet devised — that it secures the greatest efficiency in the whole industrial machine. This belief rests upon a few well-known principles which only need to be restated. In the first place, every individual of mature age and sound mind knows his own interest better than any set of public officials are likely to know it. In the second place, such an individual will, if left to himself, pursue his own interest more systematically and successfully than he could if he were given his work and directed in it by any body of public officials. In the third place, if the public, through its legal enactments and its executive and judicial officers, effectively closes every opportunity by which such an individual could further his own interest in harmful or non-serviceable ways, he will then pursue his own interest in ways that are serviceable to the community. Finally, where every individual is left absolutely free to pursue his own interests in all ways that are serviceable, and where the degree of his well-being depends upon the

amount of service which he performs, all will be spurred on by their own self-interest to render as much service as possible, and the whole community will then be served in the most effective manner possible, because all its members will be striving to serve one another in order to serve themselves.

In applying this argument there are two things which need to be observed, but which are frequently overlooked. In the first place, it is no argument in favor of *laissez faire*, or the let-alone policy of government. On the contrary, it requires governmental interference with every non-serviceable line of activity which it is possible for the law to reach. . . .

There is still a fundamental conflict of interests among the individuals of every species. The term "struggle for existence" means nothing unless it implies such a conflict. In the light of this philosophy, the primary function of human government is to neutralize as far as possible this antagonism of interests and mitigate the severities of the struggle for existence. The most enlightened governments of the present perform this function mainly by prohibiting those methods of struggling for one's own advantage which are harmful or non-serviceable in character. This and this only is a sufficient reason for laws against robbing and swindling. These are methods of pursuing one's own interests, or of struggling for existence, which all brutes practice and which man alone tries to prevent by conscious and systematic social control. They are cases where a direct pursuit of individual interest leads one to do things which are harmful to the rest of society, in other words, where interests conflict. Man has been defined as the animal which assumes the active rôle and adapts circumstances to his own needs, whereas other animals have to be passively adapted to their circumstances Law-making no less than tool-making is a means of active adaptation. Perceiving the disadvantage of an unre-

stricted pursuit of individual interest, men consciously and intelligently frame laws to suppress such pursuits as harm the general interest, such as stealing, killing, swindling, etc. There is precisely the same reason, and no other reason whatsoever, for laws suppressing every other method of promoting one's individual interest at the expense of the general interest.

We must conclude, therefore, that though there is no good reason why the state should interfere with a capable individual for his own good, there is yet an excellent reason why it should interfere with him for the good of others. Though he knows his own interest better than public officials can be expected to know them, and will, if left to himself, pursue those interests, yet because his interests sometimes conflict with those of the rest of society, he will, if left to himself, sometimes do things which are harmful to the general interest. Here only is the ground for public interference with the capable individual. It may as well be admitted that the old liberalism erred in assuming a general harmony of interests and in concluding that government control and regulation should be limited to mere protection from violence. The new liberalism must correct this error by recognizing the conflict of interests and extending the control of government to all cases where individual interests conflict.

The new gospel of individualism must therefore proclaim three things: 1. The absolute necessity for the suppression of all harmful methods of pursuing one's self-interest. 2. The absolute freedom of the individual to pursue his self-interest in all serviceable ways. 3. The absolute responsibility of the individual for his own well-being, — allowing those to prosper who, on their own initiative, find ways of serving the community, and allowing those who cannot to endure the shame of poverty.

CHAPTER XI

LIBERTY OF CONTRACT IN AMERICAN CONSTITUTIONAL THEORY[1]

[1.] "The right of a person to sell his labor," says Mr. Justice Harlan, "upon such terms as he deems proper, is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. . . . In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land." [2] With this positive declaration of a lawyer, the culmination of a line of decisions now nearly twenty-five years old, a statement which a recent writer on the science of jurisprudence has deemed so fundamental as to deserve quotation and exposition at an unusual length, as compared with his treatment of other points,[3] let us compare the equally positive statement of a sociologist:

"Much of the discussion about 'equal rights' is utterly

[1] [By Roscoe Pound: born at Lincoln, Neb., October 27, 1870; A.B., 1888, A.M., 1889, Ph.D. 1897, University of Nebraska; since 1916, dean of Harvard Law School.

The selection above reprinted is from his essay entitled "Liberty of Contract" (Yale Law Journal, May, 1909) (parts omitted).]

[2] *Adair v. United States*, 208 U. S. 161, 175.

[3] Taylor, "Science of Jurisprudence," pp. 538–542.

hollow. All the ado made over the system of contract is surcharged with fallacy." [1]

To everyone acquainted at first hand with actual industrial conditions the latter statement goes without saying. Why, then, do courts persist in the fallacy? Why do so many of them force upon legislation an academic theory of equality in the face of practical conditions of inequality? Why do we find a great and learned court in 1908 taking the long step into the past of dealing with the relation between employer and employee in railway transportation, as if the parties were individuals — as if they were farmers haggling over the sale of a horse? [2] Why is the legal conception of the relation of employer and employee so at variance with the common knowledge of mankind? The late President has told us that it is because individual judges project their personal, social and economic views into the law. A great German publicist holds that it is because the party bent of judges has dictated decisions. But when a doctrine is announced with equal vigor and held with equal tenacity by courts of Pennsylvania and of Arkansas, of New York and of California, of Illinois and of West Virginia, of Massachusetts and of Missouri, we may not dispose of it so readily. Surely the sources of such a doctrine must lie deeper. Let us inquire, then, what further and more potent causes may be discovered, how these causes have operated to bring about the present state of the law as to freedom of contract, what the present doctrine of the courts is upon that subject, and how far we may expect amelioration thereof in the near future.

[2.] It is significant that the subject, so far as the form it now takes is concerned, is a new one. The phrase

[1] Ward, "Applied Sociology," 281. See Wright, "Practical Sociology" (5th ed.), 226, Seager, "Introduction to Economics" (3rd ed.), Sects. 234 ff. "For one who really understands the facts and forces involved, it is mere juggling with words and empty legal phrases." Ely, "Economic Theory and Labor Legislation," 18.

[2] See Mr. Olney's paper, 42 American Law Review, 164.

"liberty of contract" is not to be found in Lieber's "Civil Liberty and Self-Government," published in 1853. It is not to be found in Professor Burgess's "Political Science and Constitutional Law" published in 1890. The first decision turning upon it was rendered in 1886. The first extended discussion of the right of free contract as a fundamental natural right is in Spencer's "Justice," written in 1891. The eighteenth century writers on natural law say nothing about it. To the eighteenth century jurist, the all important thing was that promises should be kept. Montesquieu's description of the Troglodytes, who perished utterly because they wilfully violated contracts,[1] expresses their feeling. That promises have, in fact, had to depend during the greater part of legal history much more upon individual honesty than upon positive law, seemed to them at variance with the law of nature.[2] We see an echo of this discussion in the opinion of Chief Justice Marshall in *Sturges v. Crowninshield*.[3]

The idea that unlimited freedom of making promises was a natural right came after the enforcement of promises had become a matter of course. It began as a doctrine of political economy, as a phase of Adam Smith's doctrine which we commonly call *laisser faire*.[4] It was propounded as a utilitarian principle of politics and legislation by Mill.[5] Spencer deduced it from his formula of justice. In this way it became a chief article in the creed of those who sought to minimize the functions of the state, that the most important of its functions was to enforce by law the obligations created by contract.[6] But we must remember

[1] "Lettres Persanes," Lettre XIV, et seq.

[2] Maine, "Ancient Law," Pollock's Ed., 325.

[3] 4 Wheat., 122, 197.

[4] "Wealth of Nations," Bk. IV, Chap. IX, Thorold Rogers' ed. II, 272–3. Ricardo laid it down as a principle of political economy that legislation should not interfere with contracts. "Works" (McCulloch's ed.), 57. See a discussion of the juristic bearings of these doctrines in Berolzheimer's "System der Rechts und Wirtschaftsphilosophie," II, § 32.

[5] "Liberty," Chap. IV.

[6] Ritchie, "Natural Rights," 227.

that the task of the English individualists was to abolish a body of antiquated institutions that stood in the way of human progress. Freedom of contract was the best instrument at hand for the purpose. They adopted it as a means, and made it an end.[1] While this evolution of juristic and political thought was in progress, the common law too had become thoroughly individualistic; partly from innate tendency, partly through theological influence, partly through the contests between the courts and the crown in the sixteenth and seventeenth centuries, and partly as a result of the course of thought in the eighteenth and nineteenth centuries. This bit of history may suggest the chief, although not all, of the causes of the phenomenon we are considering.

[3.] In my opinion, the causes to which we must attribute the course of American constitutional decisions upon liberty of contract are seven: (1) The currency in juristic thought of an individualist conception of justice, which exaggerates the importance of property and of contract, exaggerates private right at the expense of public right, and is hostile to legislation, taking a minimum of law-making to be the ideal; (2) what I have ventured to call on another occasion a condition of mechanical jurisprudence, a condition of juristic thought and judicial action in which deduction from conceptions has produced a cloud of rules that obscures the principles from which they were drawn, in which conceptions are developed logically at the expense of practical results and in which the artificiality characteristic of legal reasoning is exaggerated; (3) the survival of purely juristic notions of the state and of economics and politics as against the social conceptions of the present; (4) the training of judges and lawyers in eighteenth century philosophy of law and the pretended contempt for philosophy in law that keeps the

[1] See Dicey's "Law and Public Opinion in England," 148–150; Sidgwick, "Elements of Politics" (2d ed.), 83.

legal profession in the bonds of the philosophy of the past because it is to be found in law-sheep bindings; (5) the circumstance that natural law is the theory of our bills of rights and the impossibility of applying such a theory except when all men are agreed in their moral and economic views and look to a single authority to fix them; (6) the circumstance that our earlier labor legislation came before the public was prepared for it, so that the courts largely voiced well-meant but unadvised protests of the old order against the new, at a time when the public at large was by no means committed to the new; [1] and (7) by no means least, the sharp line between law and fact in our legal system which requires constitutionality, as a legal question, to be tried by artificial criteria of general application and prevents effective judicial investigation or consideration of the situations of fact behind or bearing upon the statutes.

[(1)] Four stages may be observed in the development of the juristic idea of justice. Understand me. I am not speaking of the ethical conception nor of the political conception, closely as they are related to and much as they may have determined the juristic idea. We say that the end of law is the administration of justice. What do we mean here by the term "justice"? What is it that courts and jurists have sought to accomplish in the adjustment of human relations in public tribunals? The primitive idea was simply to keep the peace. Justice, juristically, was a device to keep the peace. Whatever served to avert private vengeance and prevent private war was an instrument of justice. The Salic Law awarded twice the compensation to the vigorous and half-civilized Frank that it did to the effete and civilized Roman, because it required more to move the Frank to restrain his anger and withhold his vengeance.[2] But Greek philosophy and

[1] Professor Seager has made a similar suggestion. "Introduction to Economics" (3d ed.), 417.

[2] Salic Law, *tit.* XIV.

Roman law soon got beyond this conception and gave us in its place an idea of justice as a device to preserve the social *status quo*, to keep each man in his appointed groove and thus prevent friction with his fellows. Plato sets this out very clearly.[1] In his ideal state, "every member of the community must be assigned to the class for which he proves himself best fitted. Thus, a perfect harmony and unity will characterize both the state and every person in it." [2] The Stoic doctrine of conformity to universal reason came to much the same practical result.[3] To Aristotle, rights existed only between those who were free and equal; [4] justice demanded a unanimity in which there would be no violation of mutual rights,[5] and law and right took "account in the first instance of relations of inequality, in which individuals are treated in proportion to their worth, and only secondarily of relations of equality." [6] Roman legal genius gave practical effect to this idea of justice by making it the province of the state to define and protect interests and powers of action which in the aggregate made up the legal personality of the individual.[7] The precepts of law, as laid down in the Institutes, — *honeste vivere*, *alienum non laedere*, *suum cuique tribuere* — come to this. As Courcelle-Seneuil has put it, the Roman ideal was a stationary society, corrected from time to time by a reversion to the ancient type.[8] Roman natural law was simply an appeal to reason against formalism. The natural law of the Middle Ages and of the seventeenth century — an appeal to reason against authority — is a very different thing.

[1] Republic, III, 424.
[2] Dunning, "Political Theories, Ancient and Medieval," 28.
[3] *Ibid.*, 105.
[4] Zeller, "Aristotle and the Earlier Peripatetics" (translated by Costelloe and Muirhead), II, 175.
[5] Eth. Nicomach., VIII, 1, 24.
[6] Zeller, op. cit., II, 197.
[7] This is well put in Willoughby, "Political Theories of the Ancient World," 64.
[8] "Préparation a l'étude du droit," 99, 396. See Guyot, "Principles of Social Economy" (Leppington's translation), 2nd ed., 299.

Appeal to reason against authority led to a new conception in philosophy, in theology, in politics and ultimately in legal theory, as a result of which justice came to be regarded as a device to secure a maximum of individual self-assertion. The beginnings of this are in philosophy. As Lord Acton put it: "Not the devil, but St. Thomas Aquinas was the first Whig." [1] Teutonic individualism, kept back by Roman authority in religion and law, broke over. Puritan theology gave rise to ultra individualism in church polity and religion. The appeal to reason against the crown developed political doctrines of civil liberty and natural rights of the individual. And as Coke, the great light of our legal system, was in the forefront of the controversy with the crown and read all legal history in the light of the exigencies of that controversy,[2] the liberties of the individual Englishman came to assume a central point in that system that would have been taken by public good and the powers of the state if Bacon rather than Coke had been the inspiration of eighteenth century commentators and nineteenth century courts. Moreover, our constitutional models and our bills of rights were drawn in the period in which the natural law school of jurists was at its zenith, and the growing period of American law coincided with the high tide of individualistic ethics and economics. Hence his school course in political economy and his office reading of Blackstone taught the nineteenth century judge the same things as fundamentals.[3] He became persuaded that they were the basis

[1] Figgis, "From Gerson to Grotius," 7.

[2] Compare his interpretation of Tregor's Case (Y. B. 8 E. 3, 30) and the case in Fitzh. Abr. Cessavit, 42, in Bonham's Case, 8 Rep. 108a, 118a, with the cases themselves.

[3] "Like all other contracts, wages should be left to the fair and free competition of the market, and should never be controlled by the interference of the legislature." Ricardo, "Principles of Political Economy," Chap. V, §7. Chapter XI of Bk. V. of Mill's "Political Economy," entitled "Of the Grounds and Limits of the *Laisser faire* or Non-Interference Principle," was studied by every liberally educated lawyer of the last fifty years. Mill (*Ibid.*, Sect. 12) disapproves of, but at the same time suggests an argument in favor of, legislation limiting the hours of

of the jural order, and, as often happens, the individualist conception of justice reached its complete logical development after the doctrine itself had lost its vitality. Social justice, the last conception to develop, had already begun to affect not merely legal thought but legislation and judicial decision, while the courts were working out the last extreme deductions from the older conception.[1]

M. Worms, taking no account of the first stage above suggested, has summed up the other three in these words: "To sum up, justice has tried to organize society to the profit of force, later independently of force, and it dreams today of organizing it against force." [2] But our ideal of justice has been to let every force play freely and exert itself completely, limited only by the necessity of avoiding friction. As a result, and as a result of our legal history, we exaggerate the importance of property and of contract, as an incident thereof. A leader of the bar, opposing the income tax, argues that a fundamental object of our polity is "preservation of the rights of private property." [3] Text writers tell us of the divine origin of property.[4] The Supreme Court of Wisconsin tells us that the right to take property by will is an absolute and inherent right, not depending upon legislation.[5] The absolute certainty which is one of our legal ideals, an ideal responsible for

labor. In Laughlin's edition (1884) the editor argues against such legislation (p. 193). We are now prepared to read in the opinion of O'Brien, J., in *People v. Coler*, 166 N. Y. 1, that "A law that restricts the freedom of contract on the part of both the master and servant cannot in the end operate to the benefit of either" (p. 16). Also: "It was once a political maxim that the government governs best which governs the least. It is possible that we have now outgrown it, but it was an idea that was always present to the minds of the men who framed the Constitution, and it is proper for the courts to bear it in mind when expounding that instrument." (p. 14.)

[1] See my paper, "The Need of a Sociological Jurisprudence," 19 Green Bag, 607.

[2] "Philosophie des Sciences Sociales," II, 222.

[3] Argument of Mr. Choate in the Income Tax cases, 157 U. S. 429, 534.

[4] Smith, "Personal Property," Sect. 33. Berolzheimer sums up the characteristic features of common law legal speculation thus: "Unlimited high valuation of individual freedom and respect for individual property." "System des Rechts und Wirtschaftsphilosophie," II, 160.

[5] *Nunnemacher v. State*, 108 N. W. 627,

much that is irritatingly mechanical in our legal system, is demanded chiefly to protect property.[1] And our courts regard the right to contract, not as a phase of liberty — a sort of freedom of mental motion and locomotion — but as a phase of property, to be protected as such.[2] A further result is to exaggerate private right at the expense of public interest. Blackstone's proposition that "the public good is in nothing more essentially interested than in the protection of every individual's private rights,"[3] has been quoted in more than one American decision;[4] and one of these is a case often cited in support of extreme doctrines of liberty of contract.[5] It is but a corollary that liberty of contract cannot be restricted merely in the interest of a contracting party. His right to contract freely is to yield only to the safety, health, or moral welfare of the public.[6] Still another result is that bench and bar distrust and object to legislation. I have discussed the history and the causes of this attitude toward legislation on another occasion.[7] Suffice it to say here that the doctrine as to liberty of contract is bound up in the decisions of our courts with a narrow view of what constitutes special or class legislation that greatly limits effective law-making. If we can only have laws of wide generality of application, we can have only a few laws; for the wider their application the more likelihood there is of injustice in concrete cases. But from the individualist standpoint a minimum of law is desirable. The common law antip-

[1] See my paper, "Enforcement of Law," 20 Green Bag, 401, 408.

[2] Occasionally it is said to be "both a liberty and a property right." *Frorer v. People*, 141 Ill. 171, 181. Professor Seager suggests another reason for American exaggeration of the importance of property. "Introduction to Economics" (3rd ed.), 21. He points out that this exaggeration has resulted in "an industrial civilization which has been marked thus far by intense individualism in thought and practice."

[3] 1 Comm. 139.

[4] See for example *Wynhamer v. People*, 13 N. Y. 378, 387; *Chase v. Beal*, 31 Mich. 491.

[5] *Wynhamer v. People, supra.*

[6] *People v. Marcus*, 128 N. Y. 257, In re *House Bill 203*, 21 Col. 27.

[7] "Common Law and Legislation," 21 Harvard Law Review 383.

athy to legislation sympathizes with this, and in consequence we find courts saying that it is not necessary to consider the reasons that led up to the type of legislation they condemn [1] and that the maxim that the government governs best which governs least is proper for courts to bear in mind in expounding the Constitution.[2]

[(2)] The second cause, a condition of mechanical jurisprudence, I have discussed in its relation to the legal system generally in another place.[3] The effect of all system is apt to be petrifaction of the subject systematized. Legal science is not exempt from this tendency. Legal systems have their periods in which system decays into technicality, in which a scientific jurisprudence becomes a mechanical jurisprudence. In a period of growth through juristic speculation and judicial decision, there is little danger of this. But whenever such a period has come to an end, when its work has been done and its legal theories have come to maturity, jurisprudence tends to decay. Conceptions are fixed. The premises are no longer to be examined. Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a body of rules. This is the condition Professor Henderson refers to when he speaks of the way of social progress as barred by barricades of dead precedents.[4] Manifestations of mechanical jurisprudence are conspicuous in the decisions as to liberty of contract. A characteristic one is the rigorous logical deduction from predetermined conceptions in disregard of and often in the teeth of the actual facts, which was noted at the outset. Two courts, in passing on statutes abridging the power of free contract have noted the frequency of such legislation in recent times, but have said that it was not necessary

[1] "For some reason, *not necessary to consider*, there has in modern times arisen a sentiment favorable to paternalism in matters of legislation." *Lowe v. Rees Printing Co.*, 41 Neb. 127, 135. Cf. *State v. Krentzberg*, 114 Wis. 530, 537.

[2] *People v. Coler*, 166 N. Y. 1, 14.

[3] "Mechanical Jurisprudence," 8 Columbia Law Review 605.

[4] 11 "American Journal Sociology," 847.

to consider the reasons for it.[1] Another court has asked what right the legislature has to "*assume* that one class has the need of protection against another."[2] Another has said that the remedy for the company store evil "is in the hands of the employee," since he is not compelled to buy from the employer,[3] forgetting that there may be a compulsion in fact where there is none in law. Another says that "theoretically there is among our citizens no inferior class,"[4] and, of course, no facts can avail against that theory. Another tells us that man and woman have the same rights, and hence a woman must be allowed to contract to work as many hours a day as a man may.[5] We have already noted how Mr. Justice Harlan insists on a legal theory of equality of rights in the latest pronouncement of the Federal Supreme Court. Legislation designed to give laborers some measure of practical independence, which, if allowed to operate, would put them in a position of reasonable equality with their masters, is said by courts, because it infringes on a theoretical equality, to be insulting to their manhood[6] and degrading,[7] to put them under guardianship,[8] to create a class of statutory laborers,[9] and to stamp them as imbeciles.[10] I know of nothing akin to this artificial reasoning in jurisprudence unless it be the

[1] See cases in note 38 *supra*.

[2] *State v. Haun*, 61 Kans. 146, 162.

[3] *State v. Fire Creek Coal & Coke Co.*, 33 W. Va. 188, 190. Those who have studied the *actual* situation do not look at it in this way. "He is not free to make such a contract as might please him because, like every party to a contract, he must come to such conditions as can possibly be agreed upon. He is less free than the parties to most contracts, and, further, he cannot utilize his labor in many directions; he must contract for it within restricted lines." Wright, "Practical Sociology" (5th ed.), 226.

[4] *Frorer v. People*, 141 Ill. 171, 186, holding against a statute prohibiting company stores and requiring miners to be paid weekly.

[5] *Ritchie v. People*, 155 Ill. 99, 111.

[6] *Godcharles v. Wigeman*, 113 Pa. St. 431, 437 (wages in iron mills to be paid in money).

[7] *State v. Goodwill*, 33 W. Va. 179, 186 (store orders).

[8] *Braceville Coal Co. v. People*, 147 Ill. 66, 74 (coal to be weighed for fixing wages); *State v. Haun*, 61 Kans. 146, 162 (wages to be paid in money).

[9] *People* v. *Beck*, 10 Misc. 77: hours of labor on municipal contracts.

[10] *State v. Goodwill*, 33 W. Va. 179; *Frorer v. People*, 141 Ill. 171.

explanation given by Pomponius for the transfer of legislative power from the Roman people during the Empire: "The 'plebs' found, in course of time, that it was difficult for them to meet together, and the general body of the citizens, no doubt, found it more difficult still."[1] No doubt they did. Cæsar or the praetorian prefect would have seen to that.

[(3)] Survival of a purely juristic notion of the state and of economics and politics, in contrast with the social conception of the present, the third cause suggested, can be looked at but briefly. Formerly the juristic attitude obtained in religion, in morals, and in politics as well as in law. This fundamentally juristic conception of the world, due possibly to Roman law being the first subject of study in the universities, which gave a form of legality even to theology, has passed away elsewhere. But it lingers in the courts. Jurisprudence is the last in the march of the sciences away from the method of deduction from predetermined conceptions. The sociological movement in jurisprudence, the movement of pragmatism as a philosophy of law, the movement for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assume first principles, the movement for putting the human factor in the central place and relegating logic to its true position as an instrument, has scarcely shown itself as yet in America. Perhaps the dissenting opinion of Mr. Justice Holmes in *Lochner v. New York*,[2] is the best exposition of it we have.

[1] Dig. I, 2, 2, Sect. 9. Professor Seager says of these objections: "The opposition to such regulations . . . is based on the fear that they may serve to undermine the spirit of independence of the protected persons. Experience seems to indicate that they have in fact a directly contrary effect." "Introduction to Economics" (3d ed.), 421. See also p. 423: "Those who advance it fail to consider that deadening and monotonous toil too long continued is much more inimical to the spirit of independence than any amount of legislation."

[2] 198 U. S. 45, 75. But see also Holmes, "The Path of the Law," 10 Harvard Law Review, 457, 467, 472.

[(4)] Another factor of no mean importance in producing the line of decisions we are considering is the training of lawyers and judges in eighteenth century theories of natural law. In a book just published by a well-known writer on legal subjects who has also been a teacher of law, the whole basis of discussion is natural law. The learned author does not indicate a suspicion that any doubt has been cast upon or may attach to his philosophical premises.[1] In another book published last year by a well-known practitioner, it is recommended gravely that one subject of required study in preparation for the bar be "natural and civil law, and the principles, foundation, and spirit of law," and the student is expected to learn these from Grotius, Paley's "Moral and Political Philosophy," Burlamaqui's "Natural Law," Pufendorf, and MacIntosh's "Discourses on the Study of the Law of Nature and Nations."[2] Until a comparatively recent date, all legal education, whether in school or in office, began with the study of Blackstone. Probably all serious office study begins with Blackstone or some American imitator to-day. Many schools make Blackstone the first subject of instruction to-day, and in others Blackstone is a subject of examination for admission or of prescribed reading after admission, or there are courses on elementary law in which texts reproducing the theories of the introduction to and the first book of the Commentaries are the basis of instruction. A student who is college-trained may have had a course or courses that brought him in contact with modern thought. It is quite as likely he has not, or if he has, the natural law theories which are a matter of course in all our law books are not unlikely to persuade him that what he learned in college is immaterial in the domain of law.[3]

[1] Schouler, "Ideals of the Republic" (1808).

[2] Dos Passos, "The American Lawyer," 108 (1907).

[3] Cf. the review of Schouler's "Ideals of the Republic" in 22 Harvard Law Review, 317.

Constitutional law is full of natural law notions. For one thing, there is the doctrine that apart from constitutional restrictions there are individual rights resting on a natural basis, to which courts must give effect "beyond the control of the state." [1] In the judicial discussions of liberty of contract this idea has been very prominent. The Supreme Court of Massachusetts, in passing on legislation directed against fines in cotton mills, tells us that a statute which violates "fundamental" rights "is unconstitutional and void even though the enactment of it is not expressly forbidden." [2] Another court reminds us that natural persons do not derive their right to contract from the law.[3] Another court, in passing adversely upon legislation against company stores, says any classification is arbitrary and unconstitutional unless it proceeds on "the natural capacity of persons to contract." [4] Another, in passing on a similar statute, denies that contractual capacity can be restricted, except for physical or mental disabilities.[5] Another holds that the legislature cannot take notice of the *de facto* subjection of one class of persons to another in making contracts of employment in certain industries, but must be governed by the theoretical, jural equality.[6] These natural law ideas are carried to an extreme by the Supreme Court of Illinois in *Ritchie v. People*,[7] in which case it is announced that women have a natural equality

[1] Harlan, J., in *Railway Co. v. Chicago*, 206 U. S. 226, 237 (saying that compensation for property taken for a public use is a "settled principle of universal law reaching back of all constitutional provisions"); Field, J., in *Butchers' Union, etc., Co. v. Crescent City, etc., Co.*," 111 U. S. 746, 762 ("When such [police] regulations do not conflict with any constitutional inhibition *or natural right*, their validity cannot be successfully controverted."); Miller, J., in *Loan Association v. Topeka*, 20 Wall 655, 662; Marshall, C. J., in *Fletcher v. Peck*, 6 Cranch. 87; Iredell, J., in *Calder v. Bull*, 3 Dall. 386.

[2] *Com. v. Perry*, 155 Mass. 117 (1871).

[3] *Leep v. Railway Co.*, 58 Ark. 407, 427.

[4] *State v. Loomis*, 115 Mo. 307, 315.

[5] *State v. Fire Creek Coal & Coke Co.*, 33 W. Va. 188.

[6] *State v. Haun*, 61 Kan. 140, 162.

[7] 155 Ill. 99.

with men and that no distinction may be drawn between them with respect to power of engaging to labor.

Closely related to the ideas just considered, and, indeed, a product of the same training, is a deep-seated conviction of the American lawyer that the doctrines of the common law are part of the universal jural order. Just as in nine cases out of ten, natural law meant for the seventeenth century and eighteenth century jurist the Roman law which he knew and had studied, for the common law lawyer it means the common law.[1] For one thing, this feeling leads to a narrow attitude toward legislation; a tendency to hold down all statutory innovations upon the common law as far as possible.[2] In like spirit, on this subject of liberty of contract, most of the courts which have overthrown legislation as being in derogation of liberty, have insisted that only common law incapacities can be given legal recognition;[3] that new incapacities in fact, growing out of new conditions in business and industry, cannot be taken advantage of in legislation; that the ordinary farmhand and the laborer in the beet fields, for example, must be treated alike. But, even more important for our purpose,

[1] The classical instance of this is *Cutting's Case*, Snow, "Cases on International Law," 172. See also Marcy's confusion of the rules as to citizenship in the several states of the United States with the rules of International Law as to national character. Cockburn, "Nationality," 118 *et seq.*

[2] See for some examples of this, my paper, "Common Law and Legislation," 21 Harvard Law Review, 383. Another example is to be seen in the judicial restrictions on the applications of Lord Campbell's Act. *Deni v. Pennsylvania Co.*, 181 Pa. St. 527; *Brannigan v. Union Min. Co.*, 93 Fed. 164; *McMillan v. Spider Lake, etc., Co.*, 115 Wis. 332; *Roberts v. Great Northern R. Co.*, 161 Fed. Rep. 239. The spirit of the courts in these cases is well illustrated by the following remark of the Supreme Court of Pennsylvania: "We must remember that the injury complained of is due to the *negligence of a fellow workman, for which the master is responsible neither in law nor morals.*" *Durkin v. Coal Co.*, 171 Pa. St., 193, 202. Cf. Best, C. J., in *Fairlee v. Herring*, 3 Bing. 625, 630: "I am happy to find in this case that which I find in most others, *where statutes have not interfered*, that the common law will enable us to do justice."

[3] *State v. Goodwill*, 33 W. Va. 179; *State v. Fire Creek Coal & Coke Co.*, 33 W. Va. 188, 190; *Frorer v. People*, 141 Ill. 171, 186; *State v. Loomis*, 115 Mo. 307, 315. In *State v. Loomis*, the court speaks of the common law incapacities as "natural incapacities." But these cases all distinguish usury laws, because such legislation has come to be part of our American common law.

this feeling operates in constitutional law to lead judges to try statutes by the measure of common law doctrines rather than by the Constitution.[1]

[(5, 6)] Not only, however, is natural law the fundamental assumption of our elementary books and of professional philosophy, but we must not forget that it is the theory of our bills of rights. Not unnaturally, therefore, courts have clung to it as being the orthodox theory of our constitutions. But the fact that the framers held that theory by no means demonstrates that they intended to impose the theory upon us for all time. It is contrary to their principles to assume that they intended to dictate philosophical or juristic beliefs and opinions to those who were to come after them. What they did intend was the *practical* securing of each individual against arbitrary and capricious governmental acts. They intended to protect the people against their rulers, not against themselves. They laid down principles, not rules, and rules can only be illustrations of those principles so long as facts and opinions remain what they were when the rules were announced. For instance: The cases agree that the term "liberty" is broader than Coke's use of it; that the fact that Coke confined it to freedom of physical motion and locomotion does not exclude a broader interpretation to-day. Yet the same courts that recognize that "liberty" must include more to-day than it did as used in Coke's Second Institute, lay it down that incapacities are to remain what they were at common law; that new incapacities of fact, arising out of present industrial situa-

[1] Cf. the attempt of the Supreme Court of Pennsylvania to read contributory negligence into the Federal Safety Appliances Act, *Schlemmer v. Buffalo R. & P. R. Co.*, 205 U. S. 1. But the most remarkable example is to be seen in *Grossman v. Caminez*, 79 App. Div. (N. Y.) 15, in which one of the judges, regarding the Statute of Frauds as part of the legal order of nature, said of a statute which required agents attempting to sell city lots to have written authority: "It is a denial . . . of a right or privilege, guaranteed to citizens, to make verbal contracts which are to be performed within a year."

tions, may not be recognized by legislation.[1] This is, in truth, but another illustration of the purely personal character of all natural law theories.[2]

[(7)] Last of the causes suggested, but by no means the least efficient in bringing about the line of decisions under consideration, is the sharp line between law and fact in our legal system, due originally to the exigencies of trial by jury. The line between what is for the court to pass upon and what is for the jury, has come to be called a line between law and fact. For purposes of jury trial the line itself has to be drawn often very artificially. But, beyond that, when it is drawn the tendency is to assume that questions which analytically are pure questions of fact, when they become questions for the court to decide, must be looked at in a different way from ordinary questions of fact and must be dealt with in an academic and artificial manner because they have become questions of law. The tendency to insist upon such a line and to draw it arbitrarily, has spread from the law of trials to every part of the law.

One example is to be seen in decisions as to what is a reasonable time in the law of negotiable instruments. Another may be seen in judicial pronouncements as to negligence, which are leading so many of our state legis-

[1] *Frorer v. People*, 141 Ill. 171, 181, 185–187; *Ritchie v. People*, 155 Ill. 99, 111; *Harding v. People*, 160 Ill. 459, 467; *State v. Haun*, 61 Kan. 146, 162. Cf. *People v. Marx*, 99 N. Y. 377.

[2] See some illustrations in my paper, "Common Law and Legislation," 21 Harvard Law Review, 383, 392–393. See also the statement of Curtis, J., in *Scott v. Sanford*, that "all writers" agree that slavery "is created only by municipal law." 19 How. 393, 626. But Aristotle (Politics, Bk. I, Chap. V), Grotius (II, 5, 27, Sect. 2 and 29, Sect. 2) and Rutherforth (Natural Law, Bk. I, Chap. XX, Sect. 4), who are not insignificant authorities, argue that slavery has a natural basis in some cases, beyond and apart from law. Again, in *Wynhamer v. People*, 13 N. Y. 378, 454, Hubbard, J., said: "Liquor is not a nuisance *per se, nor can it be made so by a simple legislative declaration.*" Since that time, people have changed their minds, and we find another judge saying: "The entire scheme of prohibition as embodied in the Constitution and laws of Kansas might fail, if the right of each citizen to manufacture intoxicating liquors for his own use or as a beverage were recognized. *Such a right does not inhere in citizenship.*" Harlan, J., in *Mugler v. Kansas*, 123 U. S. 623.

latures to turn the whole matter over to juries in cases of personal injury. Still another may be seen in the refinements as to constructive fraud and badges of fraud which led to wide-spread legislation, making fraud a question for the jury. It is one of the chief factors in producing what I have ventured to call mechanical jurisprudence in our legal system. In constitutional law, the necessity for drawing this line and the assumption that whatever is left to the court to decide must be dealt with artificially and disposed of mechanically, operates to the disadvantage of new types of legislation. It is felt that a law cannot be constitutional now if it would have been unconstitutional one hundred years ago. *In fact* it might have been an unreasonable deprivation of liberty as things were even fifty years ago, and yet be a reasonable regulation as things are now. But the question is not one of fact. Being for the court to decide, it must be decided upon some universal proposition, valid in all places and at all times.[1] Rate laws, in the investigation of which it may prove that a rate is confiscatory at one time and not at another, are compelling courts to recognize that the constitutionality of a statute may depend upon a pure question of fact, to be investigated and determined as such. Hence, they are likely to induce a change of judicial attitude toward other legislation, the reasonableness of which must depend upon questions of fact which only those who have investigated special industrial situations can fairly determine. As it is, in the ordinary case involving constitutionality, the court has no machinery for getting at the facts. It must decide on the basis of matters of general knowledge and on accepted principles of uni-

[1] Hence when a court had to decide whether the common law doctrine of riparian rights was applicable to and hence in force in a state where one part was arid, so that the doctrine could not be applied, another part had abundant rainfall, so that the doctrine was well suited thereto, and still another sometimes had rain and sometimes not, it could not say the rule applies here, and does not apply there, depending on the facts, but had to insist upon one rule for the whole state. *Meng v. Coffey*, 67 Neb. 500.

form application. It cannot have the advantage of legislative reference bureaus, of hearings before committees, of the testimony of specialists who have conducted detailed investigations, as the legislature can and does. The court is driven to deal with the problem artificially or not at all, unless it is willing to assume that the legislature did its duty and to keep its hands off on that ground. More than anything else, ignorance of the actual situations of fact for which legislation was provided and supposed lack of legal warrant for knowing them, have been responsible for the judicial overthrowing of so much social legislation.

[4.] Turning now to the actual state of the decisions, let us look first at the cases in which the idea of liberty of contract has been invoked to defeat legislation. The fountain head of this line of decisions seems to be the opinion of Mr. Justice Field in *Butchers' Union Co. v. Crescent City Co.*,[1] in which he restates the views of the minority in the *Slaughter House Cases*.[2] This opinion has been one of the staple citations in causes involving liberty of contract.[3] In it he took a vigorous stand against legislative interference with the "right to follow lawful callings." Although it did not represent the views of the Federal Supreme Court, this opinion had a far-reaching influence in the State Courts. It produced a reactionary line of decisions in New York on liberty to pursue one's callings,[4] and through these cases its echoes are still ringing in the books. The pioneer, and, so far as influence upon the later decisions is concerned, the leading case is *Godcharles v. Wigeman*,[5] in which, in an off-hand and

[1] 111 U. S. 746, 762.

[2] 16 Wall, 36.

[3] Cited and relied on particularly in *State v. Goodwill*, 33 W. Va. 179, 183 and, through this case and the New York cases, in nearly all the later decisions. It is interesting to note that the Supreme Court of Illinois, at least, has fallen into a settled practice of citing the opinion of the minority in the *Slaughter House Cases* as if it were that of the court.

[4] *Matter of Jacobs*, 98 N. Y. 98; *People v. Marx*, 99 N. Y. 377.

[5] (1886), 113 Pa. St. 427.

positive pronouncement, without discussion or citation, the court declared that a statute requiring payment in money of wages in iron mills, was "degrading and insulting" to the laborer and "subversive of his rights as a citizen." It said: "An attempt has been made by the legislature to do what cannot be done; that is, prevent persons who are *sui juris* from making their own contracts." In other words, it assumed that incapacities not known to the common law could not be recognized by the legislature, and ignored the palpable fact that courts of chancery had wielded a not inconsiderable power of interference with freedom of contract. In the same year the Supreme Court of Illinois passed expressly upon the subject of its dictum of two years before. The case of *Millet v. People* [1] turned chiefly upon the point that the statute was restricted to certain employers and was not applicable to employers generally. But the court (Scholfield, J.) said:

"What is there in the condition or situation of the laborer in the mine to disqualify him from contracting in regard to the price of his labor or in regard to the mode of ascertaining the price? And why should the owner of the mine not be allowed to contract in respect to such matters as to which all other property owners and agents may contract?"

The court assumes that this question answers itself. It does not conceive any examination necessary in order to ascertain whether there is not *in fact* a difference. It does not consider that laborers in mines may be in a continual condition of poverty, and that, as Lord Northington put it:

"Necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them." [2]

[1] 117 Ill. 294.
[2] *Vernon v. Bethell*, 2 Eden 110, 113.

In the decade 1890–1899, the current of decisions following *Godcharles v. Wigeman* flowed fast. The following year, the Supreme Court of Massachusetts held adversely to a statute prohibiting the imposition of fines in cotton mills.[1] The court cited *Godcharles v. Wigeman*, *Millet* v. *People*, and *State v. Goodwill;* also the New York cases as to the right to pursue one's calling. It said that the statute was "an interference with the right to make *reasonable and proper* contracts in conducting a legitimate business." But are the contracts forbidden "reasonable and proper"? The legislature thought they were not. To the court, the contrary seemed a matter of course. It was assumed to be a matter of law. Viewed as one of fact, the question assumes a very different aspect. It is interesting to observe that Mr. Justice Holmes dissented. The Supreme Court of Illinois followed with three decisions. In *Frorer v. People*,[2] the statute was directed against company stores and required employees to be paid weekly. This was held invalid, citing the New York cases above referred to, *Godcharles v. Wigeman*, the West Virginia cases, *Ex Parte Kuback* and *Com. v. Perry*. Its position is that the statute interferes with the absolute right to make what contracts one chooses. But the court recognizes that usury laws also might be thought to contravene this right, and it attempts to distinguish them thus:

"Usury laws proceed upon the theory that the lender and the borrower of money do not occupy toward each other the same relations of equality that parties do in contracting with each other in regard to the loan or sale of other kinds of property, and that *the borrower's necessities deprive him of freedom in contracting and place him at the mercy of the lender* and such laws may be *found on the statute books of all civilized nations of the world*, both ancient and modern."

[1] *Com. v. Perry* (1891) 155 Mass. 117.
[2] (1892) 141 Ill. 171.

It does not seem to have occurred to Mr. Justice Scholfield that the necessities of a miner or factory employee might impair his freedom of contract or put him at the mercy of his employers in the same way, nor that labor legislation was enacted or enacting in all modern civilized countries, nor that England, which might be supposed to be a modern civilized country, had abrogated her legislation against usury.[1]

In 1895 we meet with three cases. The first of these, *State v. Julow*,[2] decided by the Supreme Court of Missouri, involved the point passed upon in the *Adair* case. The court rules adversely upon a statute requiring employers not to prohibit their employees from joining unions or compel them to withdraw from unions. The second, decided by the Supreme Court of Colorado, has been spoken of already. The third, a decision of the Supreme Court of Illinois, probably establishes the high-water mark of academic individualism. *Ritchie v. People*[3] involved a statute regulating the hours of labor of women employed in the manufacture of clothing. It was held unconstitutional, first, because (the court said) the legislature has no right to deprive one class of persons of privileges allowed to other persons under like conditions, and second, because liberty of contract is a property right and cannot be taken away. With respect to the first of these propositions, one would think it might make some difference what the respective classes were. Certainly legislation does not allow women the same political privileges as other persons. Moreover, one would think the question whether the conditions under which women are employed in the manufacture of clothing are the same as those under which ordinary contracts are made, deserves investigation. But, to the court, the fact that the jural conditions were the same was enough. On the second point, the court cites the New York cases, *Godcharles v.*

[1] 17 and 18 Vict. C. 90. [2] 129 Mo. 163. [3] 155 Ill. 99.

Wigeman, and the *Goodwill*, *Frorer*, *Perry* and *Loomis* cases. It says that consequences injurious to the public health, welfare and safety cannot flow from the manufacture of clothing, and hence that such manufacture is not a subject of regulation. But we may grant this and still suggest that the manner of manufacture, by women and in sweatshops, for instance, may be of grave public concern.[1] . . .

After 1900, the pendulum had clearly begun to swing the other way. In *Lochner* v. *New York*,[2] a bare majority of the Supreme Court of the United States took the reactionary view, as it had fairly become by this time, of a statute prescribing the hours of labor in bakeries. The view of the majority in this case, as usual, goes back to the restatement in the *Butchers' Union Company* case of the views of the minority in the *Slaughter House Cases*. Mr. Justice Peckham cites his own definition of liberty in *Allgeyer v. Louisiana*,[3] and that definition is admittedly based upon the views of Mr. Justice Field and Mr. Justice Bradley in the cases referred to. In the *Allgeyer* case he had said: "The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration; but the term is deemed to embrace the right of the citizen

[1] In the opinion in this case, Magruder, J., says: "It will not be denied that woman is entitled to the same rights under the Constitution, to make contracts with reference to her labor as are secured thereby to men" (p. 111). It is worth while to compare this with what the same court said as to usury legislation in *Frorer v. People*, 141 Ill. 171, 186. In the latter case, the court said the legislature could deprive necessitous debtors of their natural right to contract to pay the highest rate of interest an avaricious creditor could extort from them because usury laws existed when the Constitution was adopted. Looking at the matter in this way, is it not pertinent to inquire whether married women could have made *any* contract when the Constitution was adopted? If they could not, would it follow that legislation could regulate the labor and wage contracts of married women but not those of unmarried women, or would the faith of the court in its distinction be shaken? It may be noted here conveniently that there is also in 1895 a decision of an inferior court of Pennsylvania following *Godcharles v. Wigeman*. *Com. v. Isenberg*, 8 Kulp. 116.

[2] (1905) 198 U. S. 45.

[3] 165 U. S. 578.

to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

One may grant this definition and yet deny the consequence which Mr. Justice Peckham derived from it in the *Lochner* case. His position was, in effect, that a baker had a constitutional right to contract to work as long as he pleased. He says (p. 57):

"There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week."

It will be seen that this opinion assumes two propositions of fact: (1) That the public has no concern in how long a baker works, because the time he works has no effect on the product of his labor; (2) that there is nothing in the trade of baking, as carried on in large cities, inimical to the health of those who are employed in it for long

hours at a stretch. Here again study of the facts has shown that the legislature was right and the court was wrong. Actual investigation has shown that the output of shops in which the only kind of men who can be had to work for unreasonable hours under unsanitary conditions are employed, is not at all what the public ought to eat, and that long hours in shops of the sort are distinctly injurious to health.[1] But the decisive objection to the position of the majority is put by Mr. Justice Holmes in a few sentences that deserve to become classical:

"This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty because I strongly believe that *my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . A constitution is not intended to embody a particular economic theory*, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire. . . .*"

Finally, we have two cases, one in the Court of Appeals of New York,[2] and the other, the *Adair* case, in the Supreme Court of the United States,[3] in which the doctrine of the *Julow* case is adopted and legislation to prevent employers from prohibiting employees from joining or requiring them to withdraw from labor unions is held unconstitutional, as infringing liberty of contract. In the former case, the court puts the matter thus:

[1] City Club Bulletin, Chicago, Vol. 2, No. 25 (February 24, 1909). See also the authorities cited in the dissenting opinion of Harlan, J., pp. 70–71. Sir Frederick Pollock makes this very pertinent comment: "How can the Supreme Court at Washington have conclusive judicial knowledge of the conditions affecting bakeries in New York? If it has not such knowledge as matter of fact, can it be matter of law that no conditions can reasonably be supposed to exist which would make such an enactment . . . constitutional?" 21 Law Quarterly Review, 212.

[2] *People v. Marcus* (1906) 185 N. Y. 257.

[3] (1908) 208 U. S. 161.

"The free and untrammeled right to contract is part of the liberty guaranteed to every citizen by the Federal and State Constitutions. Personal liberty is always subject to restraint when its exercise affects the safety, health or moral and general welfare of the public, but subject to such restraint, an employer and employee may make and enforce such contract relating to labor as they may agree on." (P. 255.)

In other words, the public have no interest in bringing about a real equality in labor-bargainings, even though thereby strikes and disorders may be obviated, and have no concern with contracts for labor except where the safety, health or morals of the public at large may be concerned! This is practically the position from which we found the courts starting twenty years before. . . .

Some of the statutes passed upon in the foregoing cases may have gone too far. Some of them involved bad or careless classifications. Some of them ran counter to local constitutional provisions, requiring general laws wherever possible. But one cannot read the cases in detail without feeling that the great majority of the decisions are simply wrong, not only in constitutional law, but from the standpoint of the common law, and even from that of a sane individualism.

Looking at them upon common law principles, we must first of all recognize that there never has been at common law any such freedom of contract as they postulate. From the time that promises not under seal have been enforced at all, equity has interfered with contracts in the interests of weak, necessitous, or unfortunate promisors. One of the earliest cases of equitable interference was to prevent forfeitures to which promisors had agreed solemnly under seal. Not only did equity grant to a debtor a right of redemption for which he did not stipulate, but it would not and will not let him contract it away in advance or "clog" it by a collateral agreement that will operate to

prevent a redemption.[1] In like manner, equity interfered to set aside contracts of sailors for the disposition of their wages or of prize money due them, where they appeared unfair, one-sided or inequitable.[2] It interfered also with contracts of heirs or reversioners in case of inadequacy of consideration, on the theory that they were peculiarly liable to be imposed on and subject to the danger of "sacrificing their future interests in order to meet their present wants."[3] It refused and refuses to grant specific performance of hard bargains, simply because they are hard, leaving promisees to confessedly inadequate and nugatory actions for damages. But there are no "natural incapacities" here! Courts of equity have simply recognized the facts of human intercourse, and have not suffered jural notions of equality to blind them thereto. Again, Lord Holt laid it down that the two sides of a bilateral contract were independent, because if a promisor was foolish enough to make his promise independent in form it was his own fault.[4] But here, too, equity made an inroad upon common law individualism, and on equitable grounds conditions are now said to be implied in law. It has been said that the common law will not help a fool. But equity exists to help and protect him. It is because there are fools to be defrauded and imposed upon, and unfortunates to meet with accidents and careless to make mistakes, that we have courts of equity. Surely what equity has done to abridge freedom of contract, legislation may do likewise.

[1] "A man will not be suffered in conscience to fetter himself with a limitation or restriction of his right of redemption." Lord Keeper Henley in *Spurgeon v. Collier*, 1 Eden 56, 59. "I take it to be an established rule that the mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance absolute." Lord Northington in *Vernon v. Bethell*, 2 Eden 110, 113. See *Rice v. Noakes* (1900), 2 Ch. 445; *Jarrah Timber, etc., Corporation v. Samuel* (1903), 2 Ch. 1.

[2] *Hoar v. Weldon*, 2 Ves. Sr. 516, 518; *Taylour v. Rochford*, 2 Ves. Sr. 281. Legislation in America has carried this even further.

[3] *Earl of Inchiquin v. Jansen*, 2 Ves. Sr. 125; *McClure v. Raben*, 125 Ind. 139.

[4] *Thorpe v. Thorpe*, 112 Mod. 455, 464.

Moreover, usury laws, despite all that has been said to the contrary, furnish a perfect analogy.

Rightly considered, even individualist and natural law principles lead to the same conclusion. The authorities are agreed upon the "natural" invalidity of a contract to become a slave.[1] But, as Sidgwick points out, any "serious approximation to the condition of slavery" comes to the same thing.[2] Mill, much more liberal than his followers, admits this, saying:

"Not only persons are not held to engagements which violate the rights of third parties, but it is sometimes considered a sufficient reason for releasing them from an engagement that is injurious to themselves."

Some of the writers on natural law had argued that there were cases where natural law justified sale of oneself into slavery. To this Mill says:

"He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself."[3]

The principle of this applies to any situation where a person by contract imposes substantial restraints upon his liberty. Freedom to impose these restraints, in the hands of the weak and necessitous, defeats the very end of liberty.[4] Liberty and equality *in fact* make for a rational individualism. Academic individualism defeats itself.

[1] Spencer, "Justice," Sect. 70. "The principle of freedom cannot require that he should be free not to be free. *It is not freedom to be allowed to alienate his freedom.*" Mill, "Liberty," Chap. V.

[2] "Elements of Politics" (2nd ed.), 93.

[3] "Liberty," Chap. V.

[4] See a case in point in Dicey, "Law and Public Opinion in England," 264–265.

TITLE I D: COMPARATIVE SURVEY OF THEORIES

CHAPTER XII

LAISSEZ FAIRE *VS.* SOCIALISM: THE NEW INDIVIDUALISM [1]

THE ECONOMIC SIGNIFICANCE OF CONTRACT

[1.] Perhaps the first thing which suggests itself by way of preliminary inquiry is the question, What is the source of obligation in contract? Woolsey says it is the sacredness of truth. "But wherein consists the obligation to keep a contract?" Woolsey asks, and then he replies, "Some might think that it lay in the free will of the contracting parties, in their power over themselves." Probably this is what would first suggest itself as the source of the obligation of contract — that it is founded upon the freedom of the will. "But this, although it must be presupposed, is not enough. If the binding force of a contract were to be ascribed simply to the binding force of a man's free will in relation to something which was his, why might not the same will break the contract?" You make an agreement with me and it expresses your free

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His works include: "The Distribution of Wealth" (1904); "Sociology and Social Progress" (1905); "Principles of Rural Economics" (1911); "Essays in Social Justice" (1915); "Principles of Political Economy" (1919).

The selection above reprinted is from his "Essays in Social Justice" (Cambridge, Mass.: Harvard University Press, 1915) chapter VI (parts omitted).]

will, but to-morrow you wish to break that contract, and that would also be an expression of your free will. "We must then seek for a moral foundation which can go along with that necessity of contract to human intercourse, which might be a reason of itself for enforcing the obligation *ex contractu*. That moral foundation," Woolsey says, "is the sacredness of truth and the necessity of trust for all virtues that look heavenward, or towards men who could have no fellowship with one another if separated by distrust, but would be suspicious and suspecting, hateful and hating one another. If the expression may be allowed, a man by an engagement to another creates truth and can never rightly create a lie in his mind. Truth and trust are the props without which 'the pillared firmament is rottenness and earth's base built on stubble.'"

What shall we say about this? We may say, first of all, that in general the State does not concern itself particularly about truth. Why then should it in this case? What are called *nuda pacta*, that is, friendly promises and agreements, are generally not enforced by the State. Woolsey says of *nuda pacta* "as mere kindness or some other moral sentiment dictated the promise, so a change of feeling or some new relations towards the promisee may lead him (*i.e.* the promisor) to recall it." But if it is truth itself with which the State is concerned, why does it enforce the economic contracts and not enforce the *nuda pacta?* I promise to lend you five dollars, but to-morrow I change my mind. Why should not that promise be enforced, if it is truth with which the State is concerned? It is not truth itself with which the State is concerned. Woolsey also says that immoral contracts and certain other kinds of contracts should not be binding. If this is so, then there is something else which ranks higher than truth. But there are some instances in which the State does concern itself especially with truth. We may say that this is so in the case of perjury. Shall we put break-

ing a contract in the same class with perjury? Certainly not. Or shall we say that broken contractual promises especially promote falsehood and so create distrust, lies, etc.? Scarcely. So we must make an exception here, and we cannot therefore wholly grant the adequacy of the argument.

[2.] The truth is, that the rights of contract, like others, are acquired rights, rights acquired in society, which proceed from and are developed through the State and the ground is human welfare. In the same paragraph Woolsey shows the importance of contract to society. "Take the case," he says, "of a man who makes preparations or plans for putting up a building according to my contract with him. I induce him to give me his labor or his product and deprive him of what is his without return, if I do not keep my contract. Contract," says Woolsey, "unites the present and the future — is the principal motive to labor, and the source of union among men." "Without it division of labor would to a great extent be paralyzed." It not only unites the present and the future, but the past, the present, and the future. The continuity of our economic life demands security and stability. We have only to think of what contract relations are to realize this — barter, sale, credit, letting, loans, services, deposits, domestic services, agency, partnership, professional services. Under the Roman law, however, the exercise of certain professions was thought by the Romans to be of too liberal a nature to be capable of leading to a compensation in money recoverable by judicial process. Advocates, teachers of law or grammar, philosophers, surveyors, and others were accordingly incapable of suing for their fees. A similar disability attaches to barristers under English law to this day, and attached till a few years since to physicians also. These services were not put under the head of contracts. This point of view seems very strange to the American lawyer of to-day.

But we have not only expressed contract, but implied contract. We have implied contract in the case of railway service, as when one buys a ticket.

We see then the vast economic significance of contract. Our economic relations are based largely on contract and in its absence might would prevail. It is very largely through contract that our wealth is accumulated and our share of the national dividend comes to us. But we must be on our guard here. Many relations, as we have already said, parentage, home, education, gifts and inheritances, church, and other relations, lie outside of contract in the main; yet they may have their economic side also. Contract does not exhaust economic relations. *The state itself is the source of contract, not the result.* . . .

The strong want unregulated contract; they are the economic conservatives. The reform forces must advocate regulation of contract. But so educating and strengthening the weaker as to limit the required regulation of contract is also a desirable thing and, so far as it is possible, the best thing, and of this the reformer must not lose sight. . . .

CONTRACT AND INDIVIDUALISM, LIMITED AND UNLIMITED

[1.] We take up first what we will call individualism, limited. Herbert Spencer and the late Professor W. G. Sumner of Yale may be mentioned as typical advocates of limited individualism. The moderate theory of limited individualism is stated by Sidgwick in his "Elements of Politics" (Chap. VI).

As stated by Sidgwick, there are in the civil order of society, according to the individualistic ideal, two chief elements, a negative and a positive. The negative element means the protection of life and property. The positive element means the enforcement of contract. . . .

Now the positive element, the enforcement of contract, is a principle of combination. It makes society out of atoms. We must be able to count on the fulfillment of

agreements. With contract we may have "the most elaborate social organization"; "at least," Professor Sidgwick goes on to say, "in a society of such human beings as the individualistic theory contemplates, — gifted with reason and governed by enlightened self-interest."

[2.] The theory is that we have a coincidence of free choices. We have to do with sane persons, adult and mature, with ordinary men and women, and the theory is that these can best promote their own interests. This is Adam Smith's theory in the main, that third parties do not know what I want so well as I do when I am bargaining with some one else. This is shown in an address by Lord Bramwell. Lord Bramwell states the theory in this way, "Trust to each man knowing his own interest better, and pursuing it more successfully than the law can do it for him."

The individualistic ideal then includes these ordinary elements, mature reason, absence of coercion, no violation of law or cognizable injury, no illegal coercion. But what do we mean by coercion? Sidgwick says that coercion must be limited and strictly construed according to individualistic ideals. Declarations of intentions in themselves innocent should scarcely, according to Sidgwick, invalidate agreement; pressure ought to be strictly construed.

Suppose A gains by the distress of B, but has not produced the distress of B. He takes advantage of it. Then according to the individualistic ideal, provided A is not bound to help B, any interference to compel him to make a contract more favorable than he would otherwise make is "socialistic." It may be expedient, but cannot be defended on the ground that B is "not really free." But must A disclose material facts to B? According to this theory of contract, as interpreted by Sidgwick, A is not obliged to disclose material facts to B, if the knowledge

was open to B; according to individualism, A should have the benefit of his knowledge.

The English law, however, makes some specific exceptions to the general rule of individualism, because in some kinds of exchanges B is at a marked disadvantage. Indeed, the English law makes three exceptions to the general rule, namely:

I. Contracts of marine and fire insurance.
II. Contracts for sale of land.
III. Contracts for the allotments of shares in companies; that is, for the sale of shares of corporations.

Sidgwick says that in these three orders of contracts there is strong ground for the rule that even innocent non-disclosure should invalidate title. . . .

[3.] According to Sidgwick also, the individualistic ideal carries with it the right of collective contract, the right of a body of men to contract together. Here we have a critical point in the development of the doctrine of contract and here Sidgwick parts company with the American courts, indeed with courts generally. This is not to be interpreted as meaning that the courts are opposed to collective agreements and bargains in themselves: but that combinations in carrying out their purposes naturally make agreements and bargains which involve collective interference with individual contracts and to this the courts are opposed, while Sidgwick's philosophy would allow it provided it were brought about peaceably. The American courts favor the contract of individual with individual. They say that a man's freedom is freedom of person and protection of property, and that the clause in our Constitution providing that no one shall be deprived of liberty means that he shall not be deprived of the liberty of contracting, which they claim is a part of guaranteed liberty. So they look askance upon anything which seems to take from the individual the right to make individual

contracts, and they are inclined to hold that collective agreements on the part of trade unions have a tendency to deprive the individual of the liberty of making a contract. . . .

The question may be raised whether our courts are not perhaps more consistent in their individualism than Sidgwick. We can at least ask whether socialism is after all anything more than collective bargaining carried very far. This may be an extreme position to take, but certainly if we carry collective bargaining very far it would seem to point in that direction. For example, it does not always seem to be very difficult to take the step from voluntary boards of conciliation and arbitration to compulsory arbitration. New Zealand has taken this step (1894) and the Arbitration Court penalty is as much as £500 from an employer and £10 from an employee.

[4.] A further word is necessary in this chapter, in regard to contract and individualism, unlimited. Unlimited individualism means a society organized by private agreements solely, these agreements not to involve that enforcement of constraint of will found in true contract. There are those who in the main have held to the present order of society, but in certain particulars have favored unlimited individualism, for example, with respect to the collection of debts. It has been a favorite thought with many that there should be no laws making possible the collection of debts. It has been said that if there were no such laws then the debts would be debts of honor.

But the anarchists go further still. There are unwilling to admit any constraint of wills at all. They say that true individualism is unlimited individualism, and we limit individualism when we compel a man to keep an agreement which he made yesterday or the day before. They do not admit that we have the right to make an exception to the general theory of individualism in order to secure stability and certainty. They say that if we make it a

matter of faith and honor then we will have the best kind of a society. They deny (*a*) the right of enforcement of agreement; the State, they say, represents might only and has no ethical element. This, by the way, makes our scientific anarchism dangerous *per se*. To them their cause is right *versus* might, the might of government. They deny (*b*) the expediency; the State accomplishes evil, it oppresses by interference. Certain classes of agreements they believe would not be made; certainly if made, they would not be enforced, namely those cases whereby inequality of opportunity is secured — more particularly agreements for unearned rent income, capitalistic income, etc. . . .

This brings us to "Criticism of the Individualistic Theory of Contract."

CRITICISM OF THE INDIVIDUALISTIC THEORY OF CONTRACT AND THE SOCIAL THEORY OF CONTRACT

A. *Criticism of the Individualistic Theory of Contract.* Legal equality in contract is a part of modern freedom. But we have legal equality in contract with a *de facto* inequality on account of inequality of conditions lying back of contracts. It is at this point that we must take up the work of reform everywhere, but particularly in the United States. In the absence of contract we have might, it is true; but with free contract unregulated we have also a prevalence of might and of different kinds of might, extra legal, lawless, and lawful might. We notice here, as already stated, that it is the strong and powerful especially who are the advocates of free contract unregulated and untrammeled. Free contract presupposes equals behind the contract in order that it may produce equality.

We observe then first of all:

I. *Unequal conditions preceding contract* as a basis of contract. Adam Smith's theory advocated free contract, but he wrote in an atmosphere created by the dominant

theory of the essential equality of men. But we are unable to accept the hypothesis of equality as a natural condition. . . .

In the second place, we observe:

II. *Actual legal inequality.* Among the various ways in which men are legally unequal these may be mentioned: they are unequal first on account of an unequal knowledge of the law. If we have a law precisely the same for all persons and some know the law much better than others, those who have the better knowledge of the law have a position of legal superiority. . . .

In the second place this legal inequality is seen in the unequal protection afforded to the rich and the poor by the law. This is because the poor have not the means to avail themselves of the protection of the law even if they have an equal knowledge of the law. . . .

Then in the third place we have inequality in the law itself. A fine means one thing for a poor man and another thing for a rich man. . . .

Then we have, fourth, the legal inequality which results from unequal administration of the law, or the way in which it is brought to bear upon different classes even when the law itself is the same. . . .

In the fifth place we have the failure to provide laws which the poor need, because every law represents a social force, and the poor have not the same social force which will enable them to secure law. Thus we see frequently how easy it is for great companies to secure the laws needed for their protection, and how difficult it is to secure the laws which the poor need. . . .

Then in the sixth place we have legal inequality on account of corrupt means of defeating the ends of justice which the powerful classes have at their command to a greater extent than the poor. But happily few instances are found of corruption of courts and instances of actual corruption of legislative bodies are becoming rarer.

There are, then, these six ways in which we have a manifestation of legal inequality, even when the law itself may seem to be very nearly equal for all classes. Here as elsewhere the State is the organ of freedom. The original and primal restrictions on freedom spring largely from outside the State. . . .

III. We observe as our third main head the existence of *class legislation*, for the question of class legislation arises very frequently in connection with contracts; that is, with laws regulating contracts, etc. . . .

We now pass on to

IV. What constitutes freedom? We say that contract carries with it freedom, or we say that it restricts the violation of freedom. Now what do we mean by freedom? The late Thomas Hill Green treats the subject very excellently in his article on "Contracts."

"Freedom rightly understood is the greatest of blessings;" but, he asks, "what do we mean by freedom? We do not mean," he says, "merely freedom from restraint or compulsion. We do not mean merely freedom to do as we like irrespective of what it is that we like. We do not mean a freedom that can be enjoyed by one man or one set of men at the cost of the loss of freedom to others. When we speak of freedom as something to be highly prized, we mean a positive power or capacity of doing or enjoying something worth doing or enjoying, and that too something that we do or enjoy in common with others. We mean by it a power which each man exercises through the help or security given him by his fellowmen, and which he in turn helps to secure for them." . . .

Freedom, then, is something positive, and is a social product, a social acquisition. It is then the unlimited unfolding of individuality in the service of society. The one who thus serves society in accordance with his powers receives protection and there is a right relation and cor-

respondence between the service to society and the commodities and services received from society. . . .

B. *The Social Theory of Contract.*

In opposition to the individualistic theory of contract, we place what we designate as the *social theory of contract: contract is established and maintained for social purposes.* All contracts find their logical origin in the social welfare and in this they find the grounds for their maintenance. This theory of contract is analogous to the social theory of property. We may say in fact it is substantially the same thing if we take the view of American courts that the right to contract is a property right. The proofs are similar to those given in the case of property. Contract has its individual side and its social side, but the social side is dominant and controlling and contracts of far-reaching significance are determined in their character by the legislative power while our courts constantly set aside contracts as contrary to public policy. One has but to reflect upon the significance of the Sherman law in the United States to realize this; for vast corporate enterprises covering the entire country find that their contracts must be based upon the provisions of this law. Powerful combinations like the Standard Oil and Tobacco trusts are broken to pieces because they have made contracts in restraint of trade in opposition to the Sherman law. And we have further limitations of contract in the entire protective labor legislation of modern times. . . .

The rapid progress even American courts are making in the recognition of the social theory of contract is illustrated by their treatment of assumption of risk as a defense where negligence is a breach of statutory duty. If a statute imposes a duty to provide safety appliances and makes the employer who fails to do so criminally liable, he cannot contract out of this liability. But the chief point for the economist and the sociologist is that the courts recognize that society has the dominant interest;

and thus they work away from that individualism which has done so much harm in the past. . . .

Still another point is that *public necessity, public welfare, and public policy are above private contract.* Suppose we have a drafting into the army. Can a person escape the draft and secure exemption by pleading a private contract? Of course not. This simply shows a recognition of the principle that public necessity is above private contract. . .

The Social Supervision of Contract an Indispensable Condition of Liberty.

While free contract must be the rule, liberty demands the social regulation of many classes of contracts. Regulation of contract conditions means establishing the "rules of the game" for competition. It must be done by legislation, and the enactments of legislation must be carried out largely by federal and State commissions of various sorts. It is a condition of freedom. The necessity for this springs from human nature and from the conditions existing in the kind of world in which we live. This regulation thus conforms to what in the true sense may be called natural law — law corresponding to the nature of things — whereas the old *laissez-faire* theory is opposed to natural law, if we employ that expression in any realistic sense. . . .

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CHAPTER XIII

THE THEORY OF PROPERTY[1]

WITHOUT understanding the real facts, the majority of jurists and economists have based property on hypotheses which are contradicted by history, or on arguments which lead to a conclusion quite opposite to what they wished to establish. They strove to show the justice of quiritary property, such as the Roman law has bequeathed to us; and they succeeded in proving quite another thing, — that natural property, such as it was established among primitive nations, was alone in accordance with justice.

To show the necessity of absolute and perpetual property in land, jurists invoked universal custom, *quod ab omnibus quod ubique, quod semper*. "Universal consent is an infallible sign of the necessity and consequently of the justice of an institution," says M. Léon Faucher. If this is true, as the universal custom has been the collective ownership of land, we must conclude that such ownership is alone just, or alone conformable to natural law.

Dalloz, in his "Répertoire," at the word *Propriété*, and Portalis, in his "Exposé des motifs du Code civil," assert that without the perpetual ownership of land the soil could not be cultivated; and, consequently, civilization, which rests on agriculture, would be impossible. History shows

[1] [By ÉMILE LOUIS VICTOR DE LAVELEYE: born at Bruges, Belgium, April 5, 1822; died at Doyon, near Liège, Jan. 3, 1891.
His works include: "De la propriété et de ses formes primitives (1873); "Le socialisme contemporain" (1881).
The selection above reprinted is from his "Primitive Property" (a translation from the French by G. R. L. Marriott: London: Macmillan & Co., 1878), pages 337–353 (parts omitted).]

that this assertion is not true. Full ownership, as applied to the soil, is an institution of quite recent creation. It was always the exception; and cultivation executed by the proprietor himself has been still more exceptional. Agriculture commenced and was developed under the system of common ownership and periodic partition. For the execution of lasting improvements, and even for the introduction of intensive, scientific cultivation, there is no necessity for more than a lease of from nine to eighteen years. We see this everywhere. In short, the cultivation of the soil has nearly always been accomplished by the temporary possessor, hardly ever by the perpetual proprietor.

Another very common mistake is to speak of "property" as if it were an institution having a fixed form, constantly remaining the same; whereas in reality it has assumed the most diverse forms, and is still susceptible of great and unforeseen modifications.

We will examine the different systems which have been put forward in explanation of the origin and justice of property. There are six principal ones. The Roman law gives this definition of property: *Dominium est jus utendi et abutendi re suâ, quatenus juris ratio patitur.* The definition of the "Code civil français" is fundamentally the same: "Property is the right of disposing of and of enjoying things in the most absolute manner, provided that no use is made of them prohibited by laws and regulations."

1. Roman jurists and most modern ones have considered occupancy of things without an owner as the principal title conferring property. *Quod enim nullius est id, ratione naturali, occupanti conceditur*, says the Digest. This theory can be easily maintained, so long as it only has to do with movables which can be actually seized and detained, like game taken in the chase, or goods found; but it encounters insurmountable difficulties directly we

attempt to apply it to the soil. In the first place, history shows that the earth is never regarded by men as *res nullius*. The hunting ground of hunting tribes, or the pastures of pastoral nations, are always recognized as the collective domain of the tribe; and this collective possession continues, even after agriculture has begun to fertilize the soil. Unoccupied land has therefore never been regarded as without an owner. Everywhere, in former times as in our own, it was considered as belonging to the commune or the State, so that there was no room, in former times any more than in our own, for acquisition by occupancy.

Most of the partisans of this theory do allow a sort of primitive community, *communio bonorum primæva*. But they add, that in order to obtain individual ownership of things which they took possession of, all men tacitly agreed to renounce, each for himself, this undivided right over the common domain. If it is the historic origin of property, that they seek to explain in this way, history knows of no such agreement. If it is meant as a theoretical and logical origin, in this case they lapse into the theory of contract, which we shall examine further on. . . .

Occupation is a fact resulting from chance or force. There are three of us on an island large enough to support us all, if we have each an equal part: if, by superior activity, I occupy two-thirds of it, is one of the others to die of hunger, or else become my slave? In this case the instinct of justice has always commanded an equal partition. Hence we do conceive of a right of acquisition, anterior and superior to the simple fact of apprehension, which it is called upon to limit and regulate.

Most jurists should answer the question, whether the soil can be the subject of exclusive and perpetual ownership, in the negative. "For the sovereign harmony," says M. Renouard, "has exempted from the grasp of private ownership the chief of those things without the

enjoyment of which life would become impossible to those who should be excluded in case of their appropriation." The soil is obviously among the number of such things, as also is the air and water. For man cannot live on sunlight and dew, and the possession of some portion of productive capital is necessary for him to obtain his means of support. The general principles of jurists, accordingly, commend the universal custom of primitive nations, which reserved to the tribe the collective ownership of the soil.

According to Cousin, property is the necessary consequence and condition of liberty. Liberty is sacred; property should be no less so. But liberty is only respected when conformable to the law; so property can only be respected when determined by justice. "Liberty and property demand and support each other," says M. Renouard. Undoubtedly; but as all should be free, so should all be proprietors. "Property," says this eloquent jurist, "is the condition of personal dignity." In that case it is not allowable to make a privilege of it, unless we wish to see the mass of mankind degraded and enslaved.

2. The second theory of property would make labor its basis. This is the one adopted by economists, because, since Adam Smith, they have attributed to labor the production of wealth. Locke was the first to expound this system clearly, in his treatise on "Civil Government," c. iv. Briefly, this is a summary of what he says on the subject:

God gave the soil to mankind at large, but as no one enjoys either the soil or that which it produces unless he be the owner, individuals must be allowed the use, to the exclusion of all others.

Every one has an exclusive right over his own person. The labor of his body and the work of his hands therefore are likewise his property. No one can have a greater right than he to that which he has acquired, especially if there

remain a sufficiency of similar objects for others. My labor, withdrawing objects from the state or community, makes them mine. But the right of acquisition must be limited by reason and equity. "If one exceeds the bounds of moderation and takes more than he has need of, he undoubtedly takes what belongs to others."

The limit indicated by Locke is, for movable things, the amount which we may take without allowing them to spoil. For land the limit is the amount which we can cultivate ourselves, and the condition that there be left as much for others as they require. "The measure of property," he says, "nature has well set by the extent of man's labor and the conveniences of life: no man's labor could subdue, or appropriate all; nor could his enjoyment consume more than a small part; so that it was impossible for any man, this way, to intrench upon the right of another, or acquire to himself a property, to the prejudice of his neighbor, who would still have room for as good and as large a possession. This measure, we see, confines every man's possession to a very moderate proportion, and such as he might appropriate to himself, without injury to anybody."

So according to Locke the great principle is this: "Every one ought to have as much property as is necessary for his support."

The necessity of private property results "from the conditions of human life, which require labor and some material on which it may be exercised."

As Locke admits on the one hand an equality of right in all men (ch. I. § 1), and on the other hand the necessity for every man to have a certain portion of material, on which to live by his labor, it follows that he recognizes a natural right of property in every one.

This theory is certainly more plausible than that of occupation. As M. Röder very justly remarks in his work, "Die Grundzüge des Naturrechts" (§ 79), labor es-

tablishes between man and the objects which he has transformed a far closer connection than mere occupation, whether symbolical or even actual. Labor creates value, accordingly it seems just that he who has given birth to it, should also enjoy it. Moreover, as no one can legitimately retain more than that which he can cultivate, there is a limit which prevents usurpation. But no legislation ever allowed that labor or *specification* was alone a sufficient title to establish property. He who is not already owner of the land or the material transformed, acquires nothing by his labor but a right to compensation or to remove the buildings and plantations set up on another man's land. Kant had already remarked that the cultivation of the soil was not sufficient to confer the ownership. "If labor alone," says M. Renouard ("Du Droit industriel," p. 269), "conferred a legitimate ownership, logic would demand that so much of the material produced, as exceeds the remuneration of such labor, should be regarded as not duly acquired."

Nay more: according to this theory the owner would manifestly have no right to the full value of land let to a tenant. The tenant would become co-proprietor in proportion as the land was improved by his labor; and, at the end of a certain number of years, the proprietor would entirely lose all right of ownership. In any case, he could never raise the rent; for to do so, would be to appropriate the profits of another's labor, which would obviously be a robbery.

If labor were the only legitimate source of property, it would follow that a society, in which so many laborers live in poverty and so many idlers in opulence, is contrary to all right and a violation of the true foundation of property.

The theory so imprudently adopted by most economists, and even by M. Thiers in his book, "De la Propriété," would therefore be a condemnation of all our modern organization. Jurists have violently opposed the theory. The

summary of their objections may be found in M. Warnkoenig's work, "Doctrina juris philosophica" (p. 121) and in the "Naturrecht" of Ahrens. If labor is the source of property, why should the Institutes and the Code civil have said nothing of it? It may be said that labor ought to be the source of all property, but this principle would be condemnatory of the existing organization of society.

3. In order to explain why men abandoned the primitive community, it has been asserted to have been in consequence of a convention, and thus property would be the product of contract. This theory has even less to sustain it than the preceding.

In the first place, when we seek to derive a right from a fact, we are bound to establish the reality of that fact, otherwise the right has no foundation. Now, if we go back to the historic origin of property, we find no trace of such a contract. Moreover, this convention, which we should have to seek in the night of past ages, cannot bind existing generations, and consequently cannot serve as the basis of property at the present time. Convention cannot create a general right, for it itself has no value, except so far as it is conformable to justice. If property is legitimate and necessary, it must be maintained; but a decision taken by our remote ancestors will not entitle it to respect.

Kant holds that *specification* creates a provisional ownership, which only becomes final by the consent of all the members of the society. Kant does not maintain that this consent was a historic fact: he speaks of it as a juristic necessity, or a fact the justice of which commands respect. But the moment we introduce the idea of justice, we are demanding of the general principles of law the sanction of human institutions, and to what purpose is it then to invoke a convention which has never occurred? It is enough to show that property is conformable to right.

4. Without having recourse to abstract notions of justice or to the obscurities of historic origins, many

writers of very different shades have maintained that property is the creature of law.

"Banish governments," says Bossuet, "and the earth and all its fruits are as much the common property of all mankind as the air and the light. According to this primitive natural right, no one has an exclusive right to anything, but every thing is a prey for all. In a regulated government no individual may occupy anything. . . . Hence arises the right of property, and, generally speaking, every right must spring from public authority."

Montesquieu uses nearly the same language as Bossuet,

"As men have renounced their natural independence to live under political laws, they have also renounced the natural community of goods to live under civil laws. The former laws give them liberty, the latter property."

Mirabeau said, in the tribune of the Constituent Assembly, "Private property is goods acquired by virtue of the law. The law alone constitutes property, because the public will alone can effect the renunciation of all and give a common title, a guarantee for individual enjoyment." Tronchet, one of the jurists who contributed most to the formation of the Code Civil, also said: "It is only the establishment of society and conventional laws that are the true source of the right of property." Touillier, in his commentary on the "Droit civil français," admits the same principle. "Property," according to Robespierre, "is the right of every citizen to enjoy the portion of goods guaranteed to him by the law." In his Treatise on Legislation, Bentham says: "For the enjoyment of that which I regard as mine, I can only count on the promises of the law which guarantees it to me. Property and the law were born together, and will perish together. Before law, there was no property; banish law, and all property ceases." Destutt de Tracy expresses the same opinion; and more recently, M. Laboulaye, in his "Histoire de la propriété en Occident," formulates it with great exactness: "Detention of the soil is a fact for which force alone can

compel respect, until society takes up the cause of the holder. The laws not only protect property, they give birth to it. . . . The right of property is not natural but social." It is certain, in fact, as M. Maynz remarks, that "the three legislations (Roman, German and Slavonic) which now divide Europe, derive from the State exclusively the absolute power over goods which we designate by the word property or ownership."

If M. Laboulaye and other authors of his opinion only intended to speak of a state of fact, they are right. If I have gathered fruits or occupied a spot of land, my right hand at first, and subsequently the power of the state, guarantee me the enjoyment thereof. But what is it that my strong hand or the power of the state *ought* to guarantee to me? what are the proper limits of *mine* and *thine?* is the question we have to determine. The law creates property, we are told; but what is this law, and who establishes it? The right of property has assumed the most diverse forms: which one must the legislator sanction in the cause of justice and the general interest?

To frame a law regulating property, we must necessarily know what this right of property should be. Hence the notion of property must precede the law which regulates it.

Formerly the master was recognized as owner of his slave; was this legitimate property, and did the law, which sanctioned it, create a true right? No: things are just or unjust, institutions are good or bad, before a law declares them such, exactly as two and two make four even before the fact be formulated. The relations of things do not depend on human will. Men may make good laws and bad laws, sanction right or violate it, right exists none the less. Unless every law is maintained to be just, we must allow that law does not create right. On the contrary, it is because we have an idea of justice superior to laws and conventions, that we can assert these laws or conventions to be just or unjust.

At every moment of history and in every society, conformably to the nature of mankind, there is a political and social organization, which answers best to the rational requirements of man, and is most favorable to his development. This order constitutes the empire of right. Science is called in to discover it, and legislation to sanction it. Every law which is conformable to this order is good and just; every law which is opposed to it is bad and iniquitous.

It cannot be maintained that in human society, as in the physical Universe, the existing order is necessarily the best, unless we pretend that all social iniquities are legitimate, because they are necessary, and that every attempt at reform is a folly, if not an attack on natural law. In this case, we should also have to admit that slavery, confiscation and robbery are just directly they are enjoined by law; and then the greatest attacks on right would have to be regarded as the true right. The law does not create right; right must dictate the law.

5. According to certain economists such as Roscher, Mill, and Courcelle-Seneuil, human nature is such as to require property, for without this there would be no stimulus to labor or saving. M. Adolph Wagner calls this system the economic theory of nature. Roscher formulates it thus: "Just as human labor can only arrive at complete productivity when it is free, so capital does not attain to full productive power except under the system of free private property. Who would care to save, and renounce immediate enjoyment, if he could not reckon on future enjoyment?" (Roscher, "Syst." I, §§ 77 and 82.)

"Landed property," says Mill, "if legitimate, must rest on some other justification than the right of the laborer to what he has created by his labor. The land is not of man's creation; and for a person to appropriate to himself a mere gift of nature, not made to him in particular, but

which belonged as much to all others until he took possession of it, is *primâ facie* an injustice to all the rest. . . . The private appropriation of land has been deemed to be beneficial to those who do not, as well as to those who do, obtain a share. And in what manner beneficial? Let us take particular note of this. Beneficial, because the strongest interest which the community and the human race have in the land is that it should yield the largest amount of food, and other necessary or useful things required by the community. Now, though the land itself is not the work of human beings, its produce is; and to obtain enough of that produce somebody must exert much labor, and, in order that this labor may be supported, must expend a considerable amount of the savings of previous labors. Now we have been taught by experience that the great majority of mankind will work much harder, and make much greater pecuniary sacrifices, for themselves and their immediate descendants than for the public. In order, therefore, to give the greatest encouragement to production, it has been thought right that individuals should have an exclusive property in land, so that they may have the most possible to gain by making the land as productive as they can, and may be in no danger of being hindered from doing so by the interference of any one else. This is the reason usually assigned for allowing the land to be private property, and it is the best reason that can be given."

Human institutions ought, in fact, to be alike just, and such as to procure the greatest possible happiness for the greatest number. But, as M. Adolph Wagner very well remarks, quiritary property in land is not indispensable for the good cultivation of the soil. In fact we see on all sides, perfectly cultivated lands, which belong to the State, to corporations, to village communities, and to great landowners, but are farmed by temporary occupants. It cannot therefore be maintained that private property in the soil

is an economic necessity. As Mr. Mill very truly says, if the end aimed at in establishing private ownership of the soil is to create the most powerful motive for realizing its good cultivation, the ownership should always be assigned directly to the cultivators. In any case, according to Mill, the increased value of the soil, resulting from national activity, should be reserved to the nation, and not granted to sinecurists, who reap the advantage in the form of an increased rental.

The "natural-economical" theory has this great advantage, that by basing property on general utility, it allows of successive improvements in existing institutions by the elimination of what is contrary to equity and the general interests, and by modifications consonant with new wants and technical advances.

6. The sixth system regards property as a natural right. In the present day all the advocates of property vie with one another in repeating that it is a natural right; but there are but few of them who understand the import of these words. The philosophical jurists of Germany have however, explained it very well. Fichte's theory on the point is this. The personal right of man as determined by nature is to possess a sphere of action sufficient to supply him with the means of support. This physical sphere should, therefore, be guaranteed to every one, conditionally however, on his cultivating it by his own labor. Thus all should labor, and all should also have wherewith to labor. Here are the actual words of Fichte in his excellent work on the French Revolution, "Beiträge zur Berichtigung des Urtheils über die französische Revolution": "The transformation (*bildung*) of materials by our own efforts is the true juridical basis of property, and the only natural one. He who does not labor cannot eat, unless I give him food; but he has no right to be fed. He cannot justly make others work for him. Every man has over the material world a primordial right of 'appro-

priation,' and a right of property over such things only as have been modified by him." In his book on natural law, "Grundlage des Naturrechts," Fichte says every man has an inalienable right to live by his labor, and consequently to find the means of employing his hands.

Immanuel Fichte, the son of the great philosopher, maintains similar theories in his book on Ethics, "System der Ethik" (2 B., 2 Th., § 93). The right of possession, according to him is a direct right, inalienable and antecedent to all law. Property is possession conformable to law, and guaranteed by public power. It is instituted for the general good, from whence it follows that the proprietor not only may not misuse his property, but is even juridically bound to use it well. "We come," says Fichte, "to a *social* organization of property. It will lose its exclusively private character to become a true, public institution. It will not be enough to guarantee to every one his property legally acquired; we must enable him to obtain the property which ought to accrue to him in exchange for his legitimate labor." "Labor is a duty towards oneself and towards others: he who does not work, injures another, and consequently deserves punishment" (§ 97). Every one ought to be possessed of property, says Hegel in his "Rechtsphilosophie," § 49; "*Jeder muss Eigenthum haben.*" Schiller has rendered the same idea in two lines, which contain the whole philosophy of history:

> Etwas muss er sein eigen nennen,
> Oder der Mensch wird morden und brennen.

"Man must have something that he may call his own, or he will burn and slay."

The same theory is expounded even more completely in the excellent manual on natural law ("Naturrecht") by M. H. Ahrens. According to this eminent jurist, "law consists in the group of conditions necessary for the

physical and spiritual development of man, so far as these conditions are dependent on human will. Property is the realization of the sum of the means and conditions necessary for the development, physical or spiritual, of each individual, in the quality and quantity conformable to his rational wants. The right of property includes the conditions and means for the *acquisition*, *retaining*, and *employment* of property, and comprises at the same time the judicial actions given to the proper person, for the recovery, the establishment, or the exercise of ownership."

"For every man property is a condition of his existence and development. It is based on the actual nature of man, and should therefore be regarded as an original, absolute right which is not the result of any outward act, such as occupation, labor or contract. The right springing directly from human nature, the title of being a man is sufficient to confer a right of property."

The proof of the truth of this doctrine is that the very persons who do not recognize it or who would condemn it, have admitted principles which necessarily lead to it.

"Property," says Portalis, "is a natural right; the principle of the right is in ourselves." But if it is a natural right, — a right, that is, resulting from the very nature of man, it follows that we can deprive no man of it. The reason of the existence of property indicated by Portalis implies property for all. In order to support himself, he says, man should be able to appropriate a portion of the soil to cultivate by his labor. Precisely so: but by man we must understand all men; for all, in fact, are unable to exist except by appropriation of some kind. Hence it follows from the system of Portalis, that the right of appropriation is general, and that no one ought to be deprived of it.

"Property," says Dalloz ("Réport. gén. *V°*. Propriété"), "is not an innate right, but it springs from an innate right. This innate right, which contains property in the

germ, is liberty; and from liberty property flows of necessity." If Dalloz is right, it follows that every man entitled to freedom is also entitled to property.

"Every member of the human race," says M. Renouard, "requires to be escorted by and invested with properties, which shall adhere to him and form his proprietary domain." Very well; but then social institutions must be so regulated, that by the exercise of his right of appropriation every one may attain to the escort and investiture of property.

The instinctive respect for this natural right to property residing in every man serves as a basis for the right to assistance, which is simply its equivalent, and which all legislatures, and notably that of England, have sanctioned. If the primordial right of appropriation be denied, we must allow that Malthus was right: the man who has no property has not the slightest right to turn it to account: "at the banquet of nature no place is reserved for him; he is really an intruder on the earth. Nature bids him take himself off, and she will not be slow to put this order into execution herself." Nothing can be more true. If man cannot claim the "domain of appropriation," which M. Renouard talks of, he no longer has any right to assistance.

We occupy an island, on which we live by the fruits of our labor; a shipwrecked sailor is cast on to it: what is his right? May he invoke the universal opinion of jurists, and say: You have occupied the soil in virtue of your title as human beings, because property is the condition of liberty, and of cultivation — a necessity of existence, a natural right: but I too am a man, I too have a natural right to cultivate the soil. I may therefore, on the same title as you, occupy a corner of this land to support myself by my labor.

If the justice of this claim is denied, there is no course but to throw the new comer back into the waves, or, as

Malthus says, to leave to nature the task of ridding the earth, on which there is no spot to shelter him, of his presence.

If in fact he has not the right to live by the fruits of his labor, still less can he claim to live on the fruits of other people's labor, in virtue of an assumed right to assistance. Undoubtedly we may assist him or employ him at a salary, but this is an act of benevolence, not a juridical solution of the question. If he cannot claim a share in the productive stock to live by his labor on it, he has no right at all. It is no violation of justice to allow him to die of hunger. Need we say that this solution, which seems to be that of the official school of jurists and economists, is contrary alike to the innate sentiment of justice, to natural right, to the primitive legislation of all nations, and even to the principles of those who adopt it?

In the Greek language, in which etymologies often disclose a complete philosophy, the words for *just* and *justice*, *τὸ δίκαιον*, *δικαιοσύνη*, involve the notion of equality of distribution or equal partition. By natural law is understood either, as in the seventeenth and eighteenth centuries, the sum of the laws which human instinct follows in "the state of nature"; or, as in our day, the laws which are conformable to the nature of man, and which reason discloses. Natural law in both these acceptations sanctions the right of property recognized in all.

We have in fact shown, we believe, that all nations had in primitive times an organization which secured to every man a share in the productive capital. Analysis also shows us that property is the indispensable condition of the existence, the liberty and the development of man. Innate sentiments of justice, primitive right and rational right, all agree, therefore, in imposing on every society the obligation of so organizing itself as to guarantee to every one the legitimate property which should belong to him.

"Natural rights," remarks M. Renouard, "are, as their name indicates, those which being indissolubly attached to the nature of human beings, spring from it, and live by it alone. They are the condition, not the concession, of positive laws, to which they are antecedent, and for which they form the basis." ("Du droit industriel," p. 173.)

Rights are absolute, insomuch as they conduce to perfect order; but their form is modified, because man, the subject of rights, changes. The most perfect order, constituting the obligatory domain of justice, is not the same for savages and civilized nations. A form of property, which in one place secures the greatest production and the most equitable distribution, may have very different results elsewhere; and in this case it is no longer right. What is the best form of property at any given moment we can only learn from the study of man's nature, of his wants and sentiments and the ordinary consequences of his acts. This highest order is "right," because it is the shortest and most direct road to perfection. All that in this order should belong to each member of the human race, is his individual right. The task for which every one is most apt, and in which he can be of most use to his neighbors and himself, ought to be assigned to him, and the instruments of labor necessary to this occupation, in the degree in which they exist, form his legitimate patrimony. So long as men knew of no means of subsistence but the chase, pasturage or agriculture, this patrimony was a share in the soil, a part of the *allmend*. In the middle ages in the towns, where industry was developed and organized, it was a place in the corporation with a share in the ownership of all that belonged to this community. The equalizing movement, which agitates modern society so profoundly, will probably end in obtaining new recognition of the natural right of property, and even a guarantee for its exercise, by means of institutions in harmony with the existing necessities of industry and the prescriptions of

sovereign justice. Obviously there can be no attempt at securing to every one a share in the soil, but simply an instrument of labor or a sphere for its exercise.

There must be for human affairs an order which is the best. This order is by no means always the existing one; else why should we all desire change in the latter? But it is the order which ought to exist for the greatest happiness of the human race. God knows it, and desires its adoption. It is for man to discover and establish it.

(2) METHODOLOGY

CHAPTER XIV

SOCIOLOGY OF PROPERTY: AN OUTLINE[1]

[1.] *Basic Ideas.* The most pivotal concept in present sociology is indicated by the phrase — *the human process.* The content which sociologists now put into that concept may be suggested by the formula — *progressive elimination of thwartings and inhibitions of wants by incompatible wants, and progressive realization and reenforcement by one another of wants which prove to be compatible; progressive selection and sublimation of the wants themselves being an incident of the process.*

The same conception may be expressed in terms of personality thus: *the human process is progressive elimination of types of persons that prove to be incompatible (incapable of survival together); incidentally progressive elimination of the thwartings and inhibitions of one type by another which make their common survival impossible; progressive selection and sublimation of types of persons who prove to be compatible (capable of survival together), with accelerated assistance of one type by another in sublimating and realizing their compatible wants.*

[1] [By ALBION W. SMALL: born at Buckland, Me., May 11, 1854; A.B., 1876, A.M., 1879, Colby College, Ph.D., 1889, Johns Hopkins University; since 1892, professor and head of the Department of Sociology, since 1905, dean of the Graduate School of Arts and Literature, University of Chicago; since 1895, editor American Journal of Sociology.

His works include: "General Sociology" (1905); "Adam Smith and Modern Sociology" (1907); "The Cameralists" (1909); "The Meaning of Social Science" (1910); "Between Eras, from Capitalism to Democracy" (1913).

The selection above printed is from a syllabus used by Professor Small in a seminar in Sociology. It has not been hitherto published.]

These formulas are not theorems of what the sociologists think *ought* to be. They are generalizations (necessarily on a fragmentary basis of induction) of human experience as it has been observed thus far.

Human history as known to us might be retold in a more instructive way after this form: Wants have matched themselves against other wants in persons, and the immediate resultant has been types of persons. Simultaneously with this aspect of the human process persons have reacted with one another in groups and between groups, and this reaction has intensified the process of selecting the compatible wants and persons, of crystallizing the compatible wants in coherent personalities and groups, and in accommodating group to group or in arraying groups against groups whose wants are irreconcilably alien. All the time this process turns out to be the most authentic indication of human values. In the place of the absolute standards which men have always wanted, we discover a revealing relativity of values. Given freedom of wants to show themselves and to assert themselves, given freedom of types of personality to show themselves, given freedom of types of groups to show themselves and assert themselves, demonstration follows that certain types of wants and personalities are incompatible with the equal freedom of others, certain types not only comport with the coexistence and development of others, but they reinforce one another's development. Herein we have the most authentic revelation of a universal social standard: viz. those wants, persons, groups which prove to be compatible with the coexistence and development of coördinate wants, persons, groups are the bearers of values which have the credentials of right to continuance and conservation. Rational action will aim at acceleration of the tendency to eliminate the others. It is the presumption of this course that the comprehensive human reality, to which rational conduct must learn to

adjust itself, is represented approximately by the concept the *human process* as thus interpreted. Rational human conduct, whatever its specific character, is conduct which facilitates the human process so conceived. Conduct which cannot be responsibly interpreted as promoting that process must be condemned as irrational.

[2.] *Property in its Structural Aspect. Property is a relation of ownership maintained by the will of a group between individuals or minor groups and things or opportunities.*

Property is thus, on the one side, primarily and essentially a *group* affair. While in its correlative and complementary aspect property is a power enjoyed by persons, and a function essential to the completion of personality, in its origin, its force, its continuance as property is chiefly an exercise of group energy.

Property is accordingly an appropriate subject for sociological investigation. It is much easier to project a thorough study of property than to assemble the evidence needed to make an investigation adequate. We must begin with an outline of the research which would be involved in a comprehensive and conclusive inductive study of property. While recognizing that anything less than the investigation to be indicated must rank as merely provisional, we frankly acknowledge the present limitations of social science, and that it cannot be decisive for an inquiry into the genesis, functions, and ethics of property. We freely admit that our knowledge is far from adequate to furnish a completely inductive basis for a dogmatic theory of property. On the other hand, we aim to arrive at knowledge which will be immediately available, as far as it goes, toward standardizing judgments about those efforts and processes now going forward all over the world with conscious purpose or unconscious tendency to accelerate or to retard reconstruction of property institutions. Although there is nothing in

sociological technique which can supply the lack of that historical evidence which alone could justify certain kinds of conclusions about property, enough knowledge of the workings of property systems is available to give sociology the raw material for conclusions which are entitled to respect as practically decisive, though lacking the credentials of absolutes.

At the outset all the prominence possible should be given to the statement that our formula for property contains nothing which is not to be found by implication and in virtually identical terms in every standard legal text-book. Every modern law text-book treats property as the creation of the State. In so far we are dealing with legal commonplaces. On the other hand, the standard literature of law is either silent or obscure about those implications of the group origin and conservation of all law, property institutions in particular, which objective analysis of the functional aspects of law brings out into prominence. In other words, for reasons which need not be examined here, the prevailing emphasis of law treatises is upon the *rights* created by legislation, not upon the other implications of the group acts which create and maintain those rights. Our emphasis will be not on the rights themselves, but on the effects produced upon the group, as well as upon the individual possessors of the rights by exercise of the same, and consequently upon appraisal of the sociological validity of the group acts to which the rights owe their existence. . . .

[3.] *The Psychology of Property.* I. Property as a reflex of the nature of the group, *i.e.* the polarity of the group as a working equilibrium between the one and the many, involves arrangement of some terms of coexistence, by virtue of which enough *own*-ness shall be secured to each *one*, so that no insuperable incompatibility shall remain between the *ones* as such and the whole out of which the *ones* differentiate themselves in consciousness.

This means that the whole could not maintain itself against the *ones* if it did not assure to the *ones* the minimum of conditions which assure the integrity of their *own*-ness. Insurance of the self as distinctly being, and as asserting itself in possessing something to the exclusion of other possessors, is a minimum condition of such relations between selves that they may remain parts of one another in a permanent group.

The operation of a group function securing the attachment of the members, is perhaps the most primary aspect of property which we can distinguish. It is an attribute of self-conscious persons to desire objective possessions in exclusion of all other possessing. This desire is so intense that if it is wholly thwarted, typical men will give their lives in the attempt to realize it. Gaurantee of this desire to a certain degree, and in certain forms, in enforcing as property certain claims to possession, is a part of the price which the group pays for staying a group. Property is the automatic response to the what-do-*I*-get-out-of-it attitude of the *ones*. Rousseau might have said — "The social contract contained the clause that when the group took formal shape as a state, in return for the consent of the ones to become members of the state, it would perpetually guarantee to those members satisfaction of their desire to possess. That was the foundation of property." From our standpoint that the group is first and self-conscious persons a later development, we cannot see it from Rousseau's angle. It seems to us that in order to prevent such a dissolution of the group into anarchy of persons fighting each other to the death, in view of each one's interest in seizing all the goods in sight, instinctive recognition had to be made of the economy of minimizing that fighting of would-be absolute interests in possession into a compromise of an assured minimum of possession according to standards tacitly or expressly accepted by all the members of the group. The decisive group part in

the process is in furnishing the *sanctions* by which those standards of possession are maintained. The operation of those sanctions is *property*.

Thereupon the question is always implicit in the seething of interests within the State, not whether or not there *shall be* property, but *what* property there shall be, what possession the State shall confirm by its sanctions, from what possessions it shall withhold or withdraw its sanctions. All the time, from the earliest existence of a controlled group, property of some kind and degree is its *sine qua non* unless the group bond is the arbitrary will of a despot. In the degree in which the members are aware of themselves as persons, the necessity of reciprocal recognition of personality can be satisfied only by assuring some minimum of the personal function of possession. Not the *fact* of property, but the contents of the property relation in its possible variations constitute the sociological problem first on the genetic side, second on the valuation side: or first, how did the particular type of property come to exist; second what is the outcome of the pragmatic test of property?

[4.] *Generalities on Method.* I. Ideal treatment would begin with historical survey of all the systems of property, with a digest of results: *i.e.* what things have been subject to property rights in different societies; in accordance with what basic conceptions were these property rights granted; how did these basic conceptions have their rise in the several complexes of circumstances; how did the basic conceptions and the rights maintained in consequence of them stand the test of group experience?

Only such a survey as this, extended over the experience of all groups that have contributed to the world's experimentation with property, would satisfy the requirements of sociological methodology as to positive evidence. Only such a survey would supply the inductive basis for the generalization — Such and such have been the work-

ings of the institutions of property throughout human history.

II. It is obvious that social science in its present situation controls no such basis for induction.

Our knowledge of property institutions in different types of human society is fragmentary at best. It is especially meagre in what we may call its ecological aspects. That is, even if we have recovered partial knowledge of the property institutions of a given group, our knowledge of the economic, political, cultural, social circumstances of the group is not likely to be sufficient to afford reliable indexes of the relations of cause and effect between the different physical and psychical factors of the environment and the positive laws which governed property.

III. Such being the case, it is at present out of the question to speculate about inductive interpretation of the institutions except in the most approximate and tentative sense. We know *something* about the facts of property and the workings of property in different historical situations. That something is immeasurably instructive. It must be used for all it is worth in guiding our conclusions on the basis of such provisionally inductive programs of research as the evidence warrants. We are not in a position, however, to formulate Newtonian laws of forces in the realm of property.

IV. Incidentally we may remark that this state of things constitutes a demand for large use of the monograph method in accumulating material for more precise inductions in the future about property. Functionally considered, such treatises as Savigny's Roman Law in the Middle Ages and Stubbs's Constitutional History of England, are merely monographs assembling evidence upon a minute factor in human experience. Such major monographs have stimulated numberless investigators to discover material for innumerable minor monographs

filling in gaps in the larger surveys. Whether the material is in existence for convincing inductions about the functional values of property institutions throughout human history cannot now be known. At all events, there is doubtless material in every country in the world to furnish forth monographs of greater or less value relating to the phenomena of property in different groups.

V. Our problem is to discover how firm a foundation we can lay, in the absence of that conclusive induction which would be decisive, for a philosophy of property fit to shape the policies of our own nation in particular, and sooner or later of our entire civilization.

For each group distinct enough to have its own property mores the desideratum is completion of a survey which shall exhibit the following:

(I) The antecedent postulates that sanction property in the given group.
(II) The resultant conceptions of classes or types entitled to property.
(III) The objects liable to become property.
(IV) The specific sanctions of property.
(V) The limitations of property rights.
(VI) The implications of property in the institutions of succession, inheritance and bequest.
(VII) The effects of the type of property upon:
  (*a*) the economic efficiency of the group.
  (*b*) the homogeneity of the group.
  (*c*) the structural differentiations of the group.
  (*d*) the integrity of the group.
  (*e*) the development of the group.
  (*f*) the balance of personal types in the group.
  (*g*) the relations of the group with other groups, coördinate, superior, inferior.

It goes without saying that the desiderata here scheduled have never been satisfied in the case of a single group.

This incidentally illustrates the poverty of social science — the emptiness of pretension that our knowledge of human experience has approached the character of science in the strict sense.

The more remote in time or space the property group in question, the vaguer our knowledge under the different titles in the foregoing schedule.

For purposes of illustration we may test our knowledge under the several heads in the cultural groups governed respectively by:

(*a*) the Code Napoléon.

(*b*) the Common Law as developed in Great Britain and the United States.

First: How do the two types of property institutions differ in legal definition?

Second: How do the two types differ as shown in results under the different heads?

Third: How conclusive are the best answers we can give to *First* and *Second?*

From the foregoing it is evident that the desideratum of a doctrine of property based upon conclusive induction from history cannot be satisfied.

We are left to something less decisive in determining our attitude towards property.

Frankly stated, that *something less decisive* is, in logical rating, merely *opinion.* In dependence upon opinion, social theorists merely share the common lot of human beings in general.

Our problem then becomes — *What is the most objective basis available for opinion about property?*

A categorical answer is impossible. One angle of approach to the most conclusive answer possible is by way of collation, criticism, classification, and evaluation of proposed answers.

This again must be illustrative rather than exhaustive; but examination of typical opinions about property will at least furnish warnings about outstanding *futilities* of opinion, and will serve to direct attention towards the more reliable indexes of objectivity.

The most orderly, and in some respects the most instructive way of approach to knowledge of opinions that have been held about property would be the historical and chronological method. An exhibit of the growth of opinions about property in the different civilized societies, and of the cross-transference of the influence of these opinions among societies would be instructive. Such exhibits are implied in the scheme of inductive study above.

TITLE II B: THEORIES OF PRIVATE PROPERTY

CHAPTER XV

THE LABOR THEORY OF PROPERTY [1]

§ 25. WHETHER we consider natural *reason*, which tells us, that men, being once born, have a right to their preservation, and consequently to meat and drink, and such other things as nature affords for their subsistence: or *revelation*, which gives us an account of those grants God made of the world to *Adam*, and to *Noah*, and his sons, it is very clear, that God, as king *David* says, *Psal.* cxv. 16, *has given the earth to the children of men;* given it to mankind in common. But this being supposed, it seems to some a very great difficulty, how any one should ever come to have a *property* in any thing: I will not content myself to answer, that if it be difficult to make out property, upon a supposition that God gave the world to *Adam*, and his posterity in common, it is impossible that any man, but one universal monarch, should have any *property* upon a supposition, that God gave the world to *Adam*, and his heirs in succession, exclusive of all the rest of his posterity. But I shall endeavor to show, how men might come to have a *property* in several parts of that

[1] [By JOHN LOCKE: born at Wrington, Somerset, England, Aug. 29, 1632; died at Oates, High Laver, Essex, Oct. 28, 1704.
His works include: "Essay Concerning Humane Understanding" (1690); "Two Treatises on Government" (1690); "Some Thoughts concerning Education" (1693).
The selection above reprinted is from his "Two Treatises on Government" (London: 6th imp., 1764), pages 215–238 (parts omitted).]

which God gave to mankind in common, and that without any express compact of all the commoners.

§ 26. God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life, and convenience. The earth, and all that is therein, is given to men for the support and comfort of their being. And tho' all the fruits it naturally produces, and beasts it feeds, belong to mankind in common, as they are produced by the spontaneous hand of nature; and no body has originally a private dominion, exclusive of the rest of mankind, in any of them, as they are thus in their natural state: yet being given for the use of men, there must of necessity be *a means to appropriate* them some way or other, before they can be of any use, or at all beneficial to any particular man. . . .

§ 27. Though the earth, and all inferior creatures, be common to all men, yet every man has a *property* in his own *person:* this nobody has any right to but himself. The *labor* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labor* with, and joined to it something that is his own, and thereby makes it his *property*. It being by him removed from the common state nature hath placed it in, it hath by this *labor* something annexed to it, that excludes the common right of other men: for this *labor* being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.

§ 28. That *labor* put a distinction between them and give us common: that added something to them more than nature, the common mother of all, had done; and so they became his private right. Was it a robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, not-

withstanding the plenty God had given him. We see in *commons*, which remain so by compact, that it is the taking any part of what is common, and removing it out of the state nature leaves it in, which *begins the property;* without which the common is of no use. And the taking of this or that part, does not depend on the express consent of all the commoners. . . .

§ 31. The same law of nature, that does by this means give us property, does also *bound* that *property* too. *God has given us all things richly*, 1 Tim. vi. 12, is the voice of reason confirmed by inspiration. But how far has he given it us? *To enjoy*. As much as any one can make use of to any advantage of life before it spoils, so much he may by his labor fix a property in: whatever is beyond this, is more than his share, and belongs to others. . . .

§ 32. But the *chief matter of property* being now not the fruits of the earth, and the beasts that subsist on it, but *the earth itself;* as that which takes in and carries with it all the rest; I think it is plain, that *property* in that too is acquired as the former. *As much land* as a man tills, plants, improves, cultivates, and can use the product of, so much is his *property*. . . .

§ 33. Nor was this *appropriation* of any parcel of *land*, by improving it, any prejudice to any other man, since there was still enough, and as good left; and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his inclosure for himself: for he that leaves as much as another can make use of, does as good as take nothing at all. . . .

§ 34. God gave the world to men in common; but since he gave it them for their benefit, and the greatest conveniences of life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. . . .

§ 36. The *measure of property* nature has well set by the extent of men's *labor and the conveniences of life:* no

man's labor could subdue, or appropriate all; nor could his enjoyment consume more than a small part; so that it was impossible for any man, this way, to intrench upon the right of another, or acquire to himself a property, to the prejudice of his neighbor, who would still have room for as good, and as large a possession (after the other had taken out his) as before it was appropriated. . . .

§ 44. From all which it is evident, that though the things of nature are given in common, yet man, by being master of himself, and *proprietor of his own person, and the actions or labor of it, had still in himself the great foundation of property;* and that, which made up the great part of what he applied to the support or comfort of his being, when invention and arts had improved the conveniences of life, was perfectly his own, and did not belong in common to others.

§ 45. Thus *labor*, in the beginning, *gave a right of property*, wherever any one was pleased to employ it upon what was common, which remained a long while the far greater part, and is yet more than mankind makes use of. Men, at first, for the most part, contented themselves with what unassisted nature offered to their necessities: and though afterwards, in some parts of the world (where the increase of people and stock, with the *use of money*, had made land scarce, and so of some value), the several *communities* settled the bounds of their distinct territories, and by laws within themselves regulated the properties of the private men of their society, and so, *by compact* and agreement, *settled the property* which labor and industry began; and the leagues that have been made between several states and kingdoms, either expressly or tacitly disowning all claim and right to the land in the others, possession, have, by common consent, given up their pretenses to their natural common right, which originally they had to those countries, and so have, by *positive*

agreement, settled a property amongst themselves, in distinct parts and parcels of the earth. . . .

§ 46. Now of those good things which nature hath provided in common, every one had a right (as hath been said) to as much as he could use, and *property* in all that he could effect with his labor; all that his *industry* could extend to, to alter from the state nature had put it in, was his. He that *gathered* a hundred bushels of acorns or apples, had thereby a *property* in them, they were his goods as soon as gathered. He was only to look, that he used them before they spoiled, else he took more than his share, and robbed others. And indeed it was a foolish thing, as well as dishonest, to hoard up more than he could make use of. If he gave away a part to any body else, so that it perished not uselesly in his possession, these he also made use of. And if he also bartered away plums, that would have rotted in a week, for nuts that would last good for his eating a whole year, he did no injury; he wasted not the common stock; destroyed no part of the portion of goods that belonged to others, so long as nothing perished uselessly in his hands. Again, if he would give his nuts for a piece of metal, pleased with its color; or exchange his sheep for shells, or wool for a sparkling pebble or a diamond, and keep those by him all his life he invaded not the right of others, he might heap up as much of these durable things as he pleased; the *exceeding of the bounds of* his *just property* not lying in the largeness of his possession, but the perishing of any thing uselessly in it.

§ 47. And thus *came in the use of money*, some lasting thing that men might keep without spoiling, and that by mutual consent men would take in exchange for the truly useful, but perishable supports of life.

§ 48. And as different degrees of industry were apt to give men possessions in different proportions, so this *invention of money* gave them the opportunity to continue and enlarge them. . . .

§ 50. But since gold and silver, being little useful to the life of man in proportion to food, raiment, and carriage, has its *value* only from the consent of men, whereof *labor* yet *makes*, in great part, *the measure*, it is plain, that men have agreed to a disproportionate and unequal *possession of the earth*, they having, by a tacit and voluntary consent, found out a way how a man may fairly possess more land than he himself can use the product of, by receiving in exchange for the overplus gold and silver, which may be hoarded up without injury to any one; these metals not spoiling or decaying in the hands of the possessor. This partage of things in an inequality of private possessions, men have made practicable out of the bounds of society, and without compact, only by putting a value on gold and silver, and tacitly agreeing in the use of money: for in governments, the laws regulate the right of property, and the possession of land is determined by positive constitutions.

§ 51. And thus, I think, it is very easy to conceive, without any difficulty, *how labor could at first begin a title of property* in the common things of nature, and how the spending it upon our uses bounded it. So that there could then be no reason of quarreling about title, nor any doubt about the largeness of possession it gave. Right and conveniency went together; for as a man had a right to all he could employ his labor upon, so he had no temptation to labor for more than he could make use of. This left no room for controversy about the title, nor for incroachment on the right of others; what portion a man carved to himself, was easily seen; and it was useless, as well as dishonest, to carve himself too much, or take more than he needed.

CHAPTER XVI

METAPHYSICAL BASIS OF PROPERTY[1]

ABSTRACT RIGHT

34. The completely free will, when it is conceived abstractly, is in a condition of self-involved simplicity. What actuality it has when taken in this abstract way, consists in a negative attitude towards reality, and a bare abstract reference of itself to itself. Such an abstract will is the individual will of a subject. It, as particular, has definite ends, and, as exclusive and individual, has these ends before itself as an externally and directly presented world.

35. This consciously free will has a universal side, which consists in a formal, simple, and pure reference to itself as a separate and independent unit. This reference is also a self-conscious one though it has no further content. The subject is thus so far a person. It is implied in personality that I, as a distinct being, am on all sides completely bounded and limited, on the side of inner caprice, impulse and appetite, as well as in my direct and visible outer life. But it is implied likewise, that I stand in absolutely pure relation to myself. Hence it is that in this finitude I know myself as infinite, universal and free.

[1] [By Georg W. F. Hegel: born at Stuttgart, Würtemberg, Germany, Aug. 27, 1770; died at Berlin, Nov. 14, 1831.

His works include "Phänomenologie des Geistes" (1807); "Wissenschaft der Logik" (1812–16); "Enzyklopädie der philosophischen Wissenschaften" (1817); "Grundlinien der Philosophie des Rechts" (1821).

The selection above reprinted is from his "Philosophy of Right" (translated from the German by S. W. Dyde: London: George Bell & Co., 1896), pages 43–57 (parts omitted).]

36. (1) Personality implies, in general, a capacity to possess rights, and constitutes the conception and abstract basis of abstract right. This right, being abstract, must be formal also. Its mandate is: Be a person and respect others as persons.

39. (3) A person in his direct and definite individuality is related to a given external nature. To this outer world the personality is opposed as something subjective. But to confine to mere subjectivity the personality, which is meant to be infinite and universal, contradicts and destroys its nature. It bestirs itself to abrogate the limitation by giving itself reality, and proceeds to make the outer visible existence its own.

40. Right is at first the simple and direct concrete existence which freedom gives itself directly. This unmodified existence is

(*a*) Possession or property. Here freedom is that of the abstract will in general, or of a separate person who relates himself only to himself.

(*b*) A person by distinguishing himself from himself becomes related to another person, although the two have no fixed existence for each other except as owners. Their implicit identity becomes realized through a transference of property by mutual consent, and with the preservation of their rights. This is contract.

(*c*) The will in its reference to itself, as in (*a*), may be at variance not with some other person, (*b*), but within itself. As a particular will it may differ from and be in opposition to its true and absolute self. This is wrong and crime.

PROPERTY

41. A person must give to his freedom an external sphere, in order that he may reach the completeness implied in the idea. Since a person is as yet the first abstract phase of the completely existent, infinite will, the

external sphere of freedom is not only distinguishable from him but directly different and separable.

Addition. — The reasonableness of property consists in its satisfying our needs, but in its superseding and replacing the subjective phase of personality. It is in possession first of all that the person becomes rational. The first realization of my freedom in an external object is an imperfect one, it is true, but it is the only realization possible so long as the abstract personality has this first-hand relation to its object.

44. A person has the right to direct his will upon any object, as his real and positive end. The object thus becomes his. As it has no end in itself, it receives its meaning and soul from his will. Mankind has the absolute right to appropriate all that is a thing.

45. To have something in my power, even though it be externally, is possession. The special fact that I make something my own through natural want, impulse or caprice, is the special interest of possession. But, when I as a free will am in possession of something, I get a tangible existence, and in this way first become an actual will. This is the true and legal nature of property, and constitutes its distinctive character.

46. Since property makes objective my personal individual will, it is rightly described as a private possession. On the other hand, common property, which may be possessed by a number of separate individuals, is a mark of a loosely joined company, in which a man may or may not allow his share to remain at his own choice.

Addition. — In property my will is personal. But the person, it must be observed, is this particular individual, and, thus, property is the embodiment of this particular will. Since property gives visible existence to my will, it must be regarded as "this" and hence as "mine." This is the important doctrine of the necessity of private property.

49. In my relation to external things, the rational element is that it is I who own property. But the particular element on the other hand is concerned with ends, wants, caprices, talents, external circumstances, etc. (§ 45). Upon them, it is true, mere abstract possession depends, but they in this sphere of abstract personality are not yet identical with freedom. Hence what and how much I possess is from the standpoint of right a matter of indifference.

Note. — If we can speak of several persons, when as yet no distinction has been drawn between one person and another, we may say that in personality all persons are equal. But this is an empty tautological proposition, since a person abstractedly considered is not as yet separate from others, and has no distinguishing attribute. Equality is the abstract identity set up by the mere understanding. Upon this principle mere reflecting thought, or, in other words, spirit in its middle ranges, is apt to fall, when before it there arises the relation of unity to difference. This equality would be only the equality of abstract persons as such, and would exclude all reference to possession, which is the basis of inequality. Sometimes the demand is made for equality in the division of the soil of the earth, and even of other kinds of wealth. Such a claim is superficial, because differences of wealth are due not only to the accidents of external nature but also to the infinite variety and difference of mind and character. In short, the quality of an individual's possessions depends upon his reason, developed into an organic whole. We cannot say that nature is unjust in distributing wealth and property unequally, because nature is not free and, therefore, neither just nor unjust. It is in part a moral desire that all men should have sufficient income for their wants, and when the wish is left in this indefinite form it is well-meant, although it, like everything merely well-meant, has no counterpart in reality. But, further, income is

different from possession and belongs to another sphere, that of the civic community.

Addition. — Since wealth depends upon application, equality in the distribution of goods would, if introduced, soon be disturbed again. What does not permit of being carried out, ought not to be attempted. Men are equal, it is true, but only as persons, that is, only with reference to the source of possession. Accordingly every one must have property. This is the only kind of equality which it is possible to consider. Beyond this is found the region of particular persons, and the question for the first time comes up, How much do I possess? Here the assertion that the property of every man ought in justice to be equal to that of every other is false, since justice demands merely that every one should have property. Indeed, amongst persons variously endowed inequality must occur, and equality would be wrong. It is quite true that men often desire the goods of others; but this desire is wrong, for right is unconcerned about differences in individuals.

51. In order to fix property as the outward symbol of my personality, it is not enough that I represent it as mine and internally will it to be mine; I must also take it over into my possession. The embodiment of my will can then be recognized by others as mine.

CHAPTER XVII

UTILITARIAN THEORY OF PROPERTY[1]

ENDS OF CIVIL LAW

In the distribution of rights and obligations, the legislator, as we have said, should have for his end the happiness of society. Investigating more distinctly in what that happiness consists, we shall find four subordinate ends: Subsistence, Abundance, Equality, Security.

The more perfect enjoyment is in all these respects, the greater is the sum of social happiness: and especially of that happiness which depends upon the laws.

We may hence conclude that all the functions of law may be referred to these four heads: — To provide subsistence; to produce abundance; to favor equality; to maintain security. . . .

RELATIONS BETWEEN THESE ENDS

These four objects of law are very distinct in idea, but they are much less so in practice. The same law may advance several of them; because they are often united. That law, for example, which favors security, favors, at the same time, subsistence and abundance.

But there are circumstances in which it is impossible to unite these objects. It will sometimes happen that a measure suggested by one of these principles will be condemned by another. Equality, for example, might re-

[1] [By JEREMY BENTHAM. For a list of his works, see page 92, *ante*. The selection above reprinted is from his "Theory of Legislation" (translated from the French of Etienne Dumont by R. Hildreth: London: Trübner & Co., 2d ed., 1871), pages 96–123 (parts omitted).]

quire a distribution of property which would be incompatible with security.

When this contradiction exists between two of these ends, it is necessary to find some means of deciding the preëminence; otherwise these principles, instead of guiding us in our researches, will only serve to augment the confusion.

At the first glance we see subsistence and security arising together to the same level; abundance and equality are manifestly of inferior importance. In fact, without security, equality could not last a day; without subsistence, abundance could not exist at all. The two first objects are life itself; the two latter, the ornaments of life.

In legislation, the most important object is security. Though no laws were made directly for subsistence, it might easily be imagined that no one would neglect it. But unless laws are made directly for security, it would be quite useless to make them for subsistence. You may order production; you may command cultivation; and you will have done nothing. But assure to the cultivator the fruits of his industry, and perhaps in that alone you will have done enough.

Security, as we have said, has many branches; and some branches of it must yield to others. For example, liberty, which is a branch of security, ought to yield to a consideration of the general security, since laws cannot be made except at the expense of liberty.

We cannot arrive at the greatest good, except by the sacrifice of some subordinate good. All the difficulty consists in distinguishing that object which, according to the occasion, merits preëminence. For each, in its turn, demands it; and a very complicated calculation is sometimes necessary to avoid being deceived as to the preference due to one or the other.

Equality ought not to be favored except in the cases

in which it does not interfere with security; in which it does not thwart the expectations which the law itself has produced, in which it does not derange the order already established.

If all property were equally divided, at fixed periods, the sure and certain consequence would be, that presently there would be no property to divide. All would shortly be destroyed. Those whom it was intended to favor, would not suffer less from the division than those at whose expense it was made. If the lot of the industrious was not better than the lot of the idle, there would be no longer any motives for industry.

To lay down as a principle that all men ought to enjoy a perfect *equality of rights*, would be, by a necessary connection of consequences, to render all legislation impossible. The laws are constantly establishing inequalities, since they cannot give rights to one without imposing obligations upon another. To say that all men — that is, all human beings — have equal rights, is to say that there is no such thing as subordination. The son then has the same rights with his father; he has the same right to govern and punish his father that his father has to govern and punish him. He has as many rights in the house of his father as the father himself. The maniac has the same right to shut up others that others have to shut up him. The idiot has the same right to govern his family that his family have to govern him. All this is fully implied in the absolute equality of rights. It means this, or else it means nothing. I know very well that those who maintain this doctrine of the equality of rights, not being themselves either fools or idiots, have no intention of establishing this absolute equality. They have, in their own minds, restrictions, modifications, explanations. But if they themselves cannot speak in an intelligible manner, will the ignorant and excited multitude understand them better than they understand themselves?

OF SECURITY

We come now to the principal object of law, — the care of security. That inestimable good, the distinctive index of civilization, is entirely the work of law. Without law there is no security; and, consequently, no abundance, and not even a certainty of subsistence; and the only equality which can exist in such a state of things is an equality of misery.

To form a just idea of the benefits of law, it is only necessary to consider the condition of savages. They strive incessantly against famine; which sometimes cuts off entire tribes. Rivalry for subsistence produces among them the most cruel wars; and, like beasts of prey, men pursue men, as a means of sustenance. The fear of this terrible calamity silences the softer sentiments of nature; pity unites with insensibility in putting to death the old men who can hunt no longer.

Let us now examine what passes at those terrible epochs when civilized society returns almost to the savage state; that is, during war, when the laws on which security depends are in part suspended. Every instant of its duration is fertile in calamities; at every step which it prints upon the earth, at every movement which it makes, the existing mass of riches, the fund of abundance and of subsistence, decreases and disappears. The cottage is ravaged as well as the palace; and how often the rage, the caprice even of a moment, delivers up to destruction the slow produce of the labors of an age!

Law alone has done that which all the natural sentiments united have not the power to do. Law alone is able to create a fixed and durable possession which merits the name of property. Law alone can accustom men to bow their heads under the yoke of foresight, hard at first to bear, but afterwards light and agreeable. Nothing but law can encourage men to labors superfluous for the

present, and which can be enjoyed only in the future. Economy has as many enemies as there are dissipators — men who wish to enjoy without giving themselves the trouble of producing. Labor is too painful for idleness; it is too slow for impatience. Fraud and injustice secretly conspire to appropriate its fruits. Insolence and audacity think to ravish them by open force. Thus security is assailed on every side — ever threatened, never tranquil, it exists in the midst of alarms. The legislator needs a vigilance always sustained, a power always in action, to defend it against this crowd of indefatigable enemies.

Law does not say to man, *Labor, and I will reward you;* but it says: *Labor, and I will assure to you the enjoyment of the fruits of your labor — that natural and sufficient recompense which without me you cannot preserve; I will insure it by arresting the hand which may seek to ravish it from you.* If industry creates, it is law which preserves; if at the first moment we owe all to labor, at the second moment, and at every other, we are indebted for everything to law.

To form a precise idea of the extent which ought to be given to the principle of security, we must consider that man is not like the animals, limited to the present, whether as respects suffering or enjoyment; but that he is susceptible of pains and pleasures by anticipation; and that it is not enough to secure him from actual loss, but it is necessary also to guarantee him, as far as possible, against future loss. It is necessary to prolong the idea of his security through all the perspective which his imagination is capable of measuring.

This presentiment, which has so marked an influence upon the fate of man, is called *expectation*. It is hence that we have the power of forming a general plan of conduct; it is hence that the successive instants which compose the duration of life are not like isolated and independent points, but become continuous parts of a

whole. *Expectation* is a chain which unites our present existence to our future existence, and which passes beyond us to the generation which is to follow. The sensibility of man extends through all the links of this chain.

The principle of security extends to the maintenance of all these expectations; it requires that events, so far as they depend upon laws, should conform to the expectations which law itself has created.

Every attack upon this sentiment produces a distinct and special evil, which may be called a *pain of disappointment.*

It is a proof of great confusion in the ideas of lawyers, that they have never given any particular attention to a sentiment which exercises so powerful an influence upon human life. The word *expectation* is scarcely found in their vocabulary. Scarce a single argument founded upon that principle appears in their writings. They have followed it, without doubt, in many respects; but they have followed it by instinct rather than by reason. If they had known its extreme importance they would not have failed to *name* it and to mark it, instead of leaving it unnoticed in the crowd.

OF PROPERTY

The better to understand the advantages of law, let us endeavor to form a clear idea of *property*. We shall see that there is no such thing as natural property, and that it is entirely the work of law.

Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it.

There is no image, no painting, no visible trait, which can express the relation that constitutes property. It is not material, it is metaphysical; it is a mere conception of the mind.

To have a thing in our hands, to keep it, to make it, to sell it, to work it up into something else; to use it — none of these physical circumstances, nor all united, convey the idea of property. A piece of stuff which is actually in the Indies may belong to me, while the dress I wear may not. The aliment which is incorporated into my very body may belong to another, to whom I am bound to account for it.

The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed, according to the nature of the case. Now this expectation, this persuasion, can only be the work of law. I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me. It is law alone which permits me to forget my natural weakness. It is only through the protection of law that I am able to inclose a field, and to give myself up to its cultivation with the sure though distant hope of harvest.

But it may be asked, What is it that serves as a basis to law, upon which to begin operations, when it adopts objects which, under the name of property, it promises to protect? Have not men, in the primitive state, a *natural* expectation of enjoying certain things, — an expectation drawn from sources anterior to law?

Yes. There have been from the beginning, and there always will be, circumstances in which a man may secure himself, by his own means, in the enjoyment of certain things. But the catalogue of these cases is very limited. The savage who has killed a deer may hope to keep it for himself, so long as his cave is undiscovered; so long as he watches to defend it, and is stronger than his rivals; but that is all. How miserable and precarious is such a possession! If we suppose the least agreement among savages to respect the acquisitions of each other, we see

the introduction of a principle to which no name can be given but that of law. A feeble and momentary expectation may result from time to time from circumstances purely physical; but a strong and permanent expectation can result only from law. That which, in the natural state, was an almost invisible thread, in the social state becomes a cable.

Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.

As regards property, security consists in receiving no check, no shock, no derangement to the expectation founded on the laws, of enjoying such and such a portion of good. The legislator owes the greatest respect to this expectation which he has himself produced. When he does not contradict it, he does what is essential to the happiness of society; when he disturbs it, he always produces a proportionate sum of evil.

ANSWER TO AN OBJECTION

But perhaps the laws of property are good for those who have property, and oppressive to those who have none. The poor man, perhaps, is more miserable than he would be without laws.

The laws, in creating property, have created riches only in relation to poverty. Poverty is not the work of the laws; it is the primitive condition of the human race. The man who subsists only from day to day is precisely the man of nature — the savage. The poor man, in civilized society, obtains nothing, I admit, except by painful labor; but, in the natural state, can he obtain anything except by the sweat of his brow? Has not the chase its fatigues, fishing its dangers, and war its uncertainties? And if man seems to love this adventurous life; if he has an instinct warm for this kind of perils; if the savage enjoys with delight an idleness so dearly bought; — must

we thence conclude that he is happier than our cultivators? No. Their labor is more uniform, but their reward is more sure; the woman's lot is far more agreeable; childhood and old age have more resources; the species multiplies in a proportion a thousand times greater, — and that alone suffices to show on which side is the superiority of happiness. Thus the laws, in creating riches, are the benefactors of those who remain in the poverty of nature. All participate more or less in the pleasures, the advantages, and the resources of civilized society. The industry and the labor of the poor place them among the candidates of fortune. And have they not the pleasures of acquisition? Does not hope mix with their labors? Is the security which the law gives of no importance to them? Those who look down from above upon the inferior ranks see all objects smaller; but towards the base of the pyramid it is the summit which in turn is lost. Comparisons are never dreamed of; the wish of what seems impossible does not torment. So that, in fact, all things considered, the protection of the laws may contribute as much to the happiness of the cottage as to the security of the palace.

It is astonishing that a writer so judicious as Beccaria has interposed, in a work dictated by the soundest philosophy, a doubt subversive of social order. *The right of property*, he says, *is a terrible right, which perhaps is not necessary.* Tyrannical and sanguinary laws have indeed been founded upon that right; it has been frightfully abused. But the right itself presents only ideas of pleasure, abundance, and security. It is that right which has vanquished the natural aversion to labor; which has given to man the empire of the earth; which has brought to an end the migratory life of nations; which has produced the love of country and a regard for posterity. Men universally desire to enjoy speedily — to enjoy without labor. It is that desire which is terrible; since it arms all

who have not against all who have. The law which restrains that desire is the noblest triumph of humanity over itself.

OPPOSITION BETWEEN SECURITY AND EQUALITY

In consulting the grand principle of security, what ought the legislator to decree respecting the mass of property already existing?

He ought to maintain the distribution as it is actually established. It is this which, under the name of *justice*, is regarded as his first duty. This is a general and simple rule, which applies itself to all states; and which adapts itself to all places, even those of the most opposite character. There is nothing more different than the state of property in America, in England, in Hungary, and in Russia. Generally, in the first of these countries, the cultivator is a proprietor; in the second, a tenant; in the third, attached to the glebe; in the fourth, a slave. However, the supreme principle of security commands the preservation of all these distributions, though their nature is so different, and though they do not produce the same sum of happiness. How make another distribution without taking away from each that which he has? And how despoil any without attacking the security of all? When your new repartition is disarranged — that is to say, the day after its establishment — how avoid making a second? Why not correct it in the same way? And in the meantime, what becomes of security? Where is happiness? Where is industry?

When security and equality are in conflict, it will not do to hesitate a moment. Equality must yield. The first is the foundation of life; subsistence, abundance, happiness, everything depends upon it. Equality produces only a certain portion of good. Besides, whatever we may do, it will never be perfect; it may exist a day; but the revolutions of the morrow will overturn it. The establish-

ment of perfect equality is a chimera; all we can do is to diminish inequality.

If violent causes, such as a revolution of government, a division, or a conquest, should bring about an overturn of property, it would be a great calamity; but it would be transitory; it would diminish; it would repair itself in time. Industry is a vigorous plant which resists many amputations, and through which a nutritious sap begins to circulate with the first rays of returning summer. But if property should be overturned with the direct intention of establishing an equality of possessions, the evil would be irreparable. No more security, no more industry, no more abundance! Society would return to the savage state whence it emerged.

If equality ought to prevail to-day it ought to prevail always. Yet it cannot be preserved except by renewing the violence by which it was established. It will need an army of inquisitors and executioners as deaf to favor as to pity; insensible to the seductions of pleasure; inaccessible to personal interest; endowed with all the virtues, though in a service which destroys them all. The leveling apparatus ought to go incessantly backward and forward, cutting off all that rises above the line prescribed. A ceaseless vigilance would be necessary to give to those who had dissipated their portion, and to take from those who by labor had augmented theirs. In such an order of things there would be only one wise course for the governed, — that of prodigality; there would be but one foolish course, — that of industry. This pretended remedy, seemingly so pleasant, would be a mortal poison, a burning cautery, which would consume till it destroyed the last fiber of life. The hostile sword in its greatest furies is a thousand times less dreadful. It inflicts but partial evils, which time effaces and industry repairs.

Some small societies, in the first effervescence of religious enthusiasm, have established the community of goods as

a fundamental principle. Does any one imagine that happiness was gained by that arrangement? For the sweet power of reward is substituted the sad impulses of pain. Labor, so easy and so light, when animated by hope, it is necessary under these systems to represent as a penitential means of escaping eternal punishment. So long as the religious impulse preserves its power, all labor, but all groan. So soon as it begins to grow weak, the society divides into two classes: one composed of degraded fanatics, contracting all the vices of an unhappy superstition; the others, lazy rogues, who are supported in a holy indolence by the dupes who surround them. The word equality becomes a mere pretext — a cover to the robbery which idleness perpetrates upon industry.

Those ideas of benevolence and of concord which have seduced some ardent souls into an admiration of this system are only chimeras of the imagination. In the distribution of labors, what motive could determine any to embrace the more painful? Who would undertake gross and disagreeable functions? Who would be content with his lot? Who would not find the burden of his neighbor lighter than his own? How many frauds would be contrived in order to lay upon others the labor from which all would endeavor to exempt themselves? And, in the division, how impossible to satisfy all; to preserve the appearances of equality; to prevent jealousies, quarrels, rivalries, preferences. Who would settle the numberless disputes for ever breaking out? What an apparatus of penal laws would be necessary as a substitute for the sweet liberty of choice, and the natural recompense of labor! One half the society would not suffice to regulate the other half. Thus this absurd and unjust system would only be able to maintain itself by means of a political and religious slavery, such as that of the Helots at Lacedæmon and the Indians of Paraguay, in the establishments of the Jesuits. Sublime invention of legislators, which,

to accomplish a plan of equality, makes two corresponding lots of good and of evil, and puts all the pain on one side and all the enjoyment on the other!

MEANS OF UNITING SECURITY AND EQUALITY

Is it necessary that between these two rivals, *Security* and *Equality*, there should be an opposition, an eternal war? To a certain point they are incompatible; but with a little patience and address they may, in a great measure, be reconciled.

The only mediator between these contrary interests is time. Do you wish to follow the counsels of equality without contravening those of security? — await the natural epoch which puts an end to hopes and fears, the epoch of death.

When property by the death of the proprietor ceases to have an owner, the law can interfere in its distribution, either by limiting in certain respects the testamentary power, in order to prevent too great an accumulation of wealth in the hands of an individual; or by regulating the succession in favor of equality in cases where the deceased has left no consort, nor relation in the direct line, and has made no will. The question then relates to new acquirers who have formed no expectations; and equality may do what is best for all without disappointing any. . . .

When the question is to correct a kind of civil inequality, such as slavery, it is necessary to pay the same attention to the right of property; to submit it to a slow operation, and to advance towards the subordinate object without sacrificing the principal object. Men who are rendered free by these gradations, will be much more capable of being so than if you had taught them to tread justice under foot, for the sake of introducing a new social order.

It is worthy of remark that, in a nation prosperous in its agriculture, its manufactures, and its commerce, there is a continual progress towards equality. If the laws do

nothing to combat it, if they do not maintain certain monopolies, if they put no shackles upon industry and trade, if they do not permit entails, we see great properties divided little by little, without effort, without revolution, without shock, and a much greater number of men coming to participate in the moderate favors of fortune. This is the natural result of the opposite habits which are formed in opulence and in poverty. The first, prodigal and vain, wishes only to enjoy without labor; the second, accustomed to obscurity and privations, finds pleasures even in labor and economy. Thence the change which has been made in Europe by the progress of arts and commerce, in spite of legal obstacles. We are at no great distance from those ages of feudality, when the world was divided into two classes: a few great proprietors, who were everything, and a multitude of serfs, who were nothing. These pyramidal heights have disappeared or have fallen; and from their ruins industrious men have formed those new establishments, the great number of which attests the comparative happiness of modern civilization. Thus we may conclude that *Security*, while preserving its place as the supreme principle, leads indirectly to *Equality;* while equality, if taken as the basis of the social arrangement, will destroy both itself and security at the same time.

CHAPTER XVIII

BIOLOGICAL BASIS OF PROPERTY [1]

Those forces upon which the existence of society and of man himself depends are properly designated as essential forces. They are those which lead respectively to the preservation and the perpetuation of human life, and are named accordingly the preservative and the reproductive forces of society.

THE PRESERVATIVE FORCES

The history of the preservative forces is comparatively unimportant in the pre-social state.

Become a Factor with the Recognition of Property. — But with the earliest forms of association there is usually developed some vague conception of proprietary rights. The genesis of this conception is peculiar, and a large body of facts combine to show that the idea of property was a social before it became an individual sentiment. . . .

The problem is to show that the normal operation of the preservative forces in the social aggregate would naturally evolve a system similar to or identical with the one we

[1] [By Lester F. Ward: born at Joliet, Ill., 1841; died at Washington, D.C., April 18, 1913; was assistant geologist of the United States Geological Survey, 1881–88.

His works include: "Haeckel's Genesis of Man" (1879); "The Flora of Washington" (1881); "Dynamic Sociology" (1883); "Sketch of Paleo-Botany" (1885); "Flora of the Laramie Group" (1886); "Types of the Laramie Flora" (1887); "Geographic Distribution of Fossil Plants" (1888).

The selection above reprinted is from his "Dynamic Sociology" (New York: Appleton & Co., 1910), chapter VII (parts omitted).]

know to exist. This problem involves a somewhat fundamental treatment of the philosophy of these preservative forces, and a more accurate classification of their subdivisions.

Hunger and Cold (i.e. Want) regarded as Forces. — The fact that all social forces consist in bodily desires must be kept constantly before the mind. These, as we saw, are sometimes relative, and are divisible into two general classes, positive and negative, the former seeking the active preservation, the latter merely securing the protection of life.

Classifying again on the basis of the consequences which flow from the non-satisfaction of these desires, we perceive that all those of the positive group cluster round one painful bodily state which may be generically denominated *hunger*. All those, on the other hand, belonging to the negative group may, in like manner, be conceived as clustering around another painful bodily state which may be generically denominated *cold*.

Generalizing yet again, we may contemplate the effect of both these painful bodily states, and designate this compound state by the term *want*. . . .

Subsistence. — The subjective term *want* has as its correlative the objective term *subsistence*. To obtain the latter is to satisfy the former. Spurred on by hunger and cold, with their train of concomitant and derivative forms of desire, man has hunted the wild beast, domesticated the useful animals, cultivated the soil, cleared the forests, worked the mines, fabricated an endless variety of useful articles, and transported the products of this labor over sea and land, distributing the wealth of the world. . . .

ORIGIN OF INDUSTRY

For innumerable ages the chief object of human activity must have been subsistence. Indeed, it is the chief object of the life of all lower creatures and of the majority of all

human beings to-day. The first question which every living being must settle is, How shall I obtain a subsistence? this being identical with the question, How shall I preserve my existence? Self-preservation is said to be the first law of nature. . . .

This activity, when directed by the intellectual forces to the increase of natural production, or in constraining nature to yield a larger supply of subsistence than it yields spontaneously, assumes the form and takes the name of *labor*. The first lesson, therefore, which man had to learn, as his numbers became too great for nature to supply his wants, or as he wandered away from the spot which originally supplied them without effort, was, that he must labor. . . .

The recognition of permanent property gave to man an object to pursue, an incentive to industry beyond the mere present demands of his nature. It substituted a future for a present enjoyment. Instead of consuming his product as fast as produced, he felt that in producing much more he could enjoy it at another time. It also begat exchange. The surplus of production over consumption of any one article could be converted by exchange into other articles whereby more desires could be gratified, more enjoyment obtained. . . .

Property as a Social Factor. — The vast importance of property as a means to happiness was little by little appreciated, till at length it became recognized that, in so far as a proper use is made of it, the one is a measure of the other. The measure of value in objects is the degree to which they can contribute to human happiness. Property is value possessed. Wealth is the term applied to the aggregate of property possessed by individuals or nations. When we come to recognize that the pursuit of wealth is only the pursuit of happiness, a great part of the wonder which is apt to be evinced at the widespread and all-absorbing character of this pursuit is removed.

Wealth means safety, ease, the fulfillment of desire. It means happiness.

The adoption of a system of exchange made the possession of value of any kind equivalent to the possession of the objects of personal desire. Money, whose use was at length found out, came to stand as a synonym for everything that any one could wish. . . .

GENESIS OF AVARICE

Thus Avarice, a wholly derivative sentiment, has come, and naturally too, to be one of the ruling passions. But it is not merely as a means of self-preservation that the idea of permanent possession has proved a benefactor to man. It has aroused his faculties. It has not only given him life, it has given him intelligence. Property could only be acquired through industry directed by intelligence. Those who possessed the most tact and showed the most enterprise acquired the most, had the largest number of desires satisfied, enjoyed most. Here arose a grand competition, the natural effect of which could only be to sharpen the wits and stimulate enterprise. Art and labor rose rapidly and assumed form and character. Production increased in a still more rapid ratio. Food, clothing, and shelter were placed within the reach of all who would work and could work skillfully. Conveniences and luxuries followed necessities. Weapons for the chase and for war were invented, pottery and various cooking utensils were wrought for the preparation of food, agricultural implements were devised, vehicles for travel and transportation were constructed, roads were opened and bridges built, boats were made and launched upon the waters, commerce and trade began. Plenty begat leisure, leisure observation, and observation reflection. Philosophy, history, fine art, and science took root. New desires arose, demanding new objects, and these in turn were supplied by the exercise of still higher activities.

The conception of permanent possession is what gave to civilization its initial impulse. Industry, inventive art, and skilled labor are each sustained by this vitalizing sentiment, so commonly misunderstood and so frequently condemned. . . .

THE LAW OF ACQUISITION

The development of the idea of permanent possession and the adoption of a circulating medium, which were on the whole so beneficial to man, were, nevertheless, attended with some serious abuses. The key to their explanation lies in the fundamental fact that the sole object of human effort was *to acquire*. No such consideration as justice originally found place there. Only one quality was attached to the mode of acquisition, and that was *success*. The grand rivalry was for the object, not the method; for the end regardless of the means. Those qualities both of body and mind best adapted to acquire wealth were those most valuable, most practical, and soon recognized as most respectable and most honorable. There could be but one result. Those individuals in whom these qualities were most highly developed acquired most. While the wants of each were the same, and the supply none too great, it must needs have been that the large acquisitions of this class were made at the expense of those less fortunate in the possession of these acquisitive powers. . . .

All were alike endued with a zeal for accumulation, but they did not at all distinguish between the various *modes of acquisition*. Those who acquired by producing were not actuated by any conception of the superior importance of their method. Could they have gained more by striving after wealth already produced, no one would have hesitated to abandon production and engage in traffic.

Those engaged in appropriating the products of other men's labor never entertained the least idea that their

business was less honorable or less useful than that of the producer. Neither class had any conception of these economic laws, and each individual limited himself solely to the one idea of appropriating to himself. Neither is there anything so base and sordid in this as some pseudo-moralists might claim. Man was obeying the same law that every other living creature obeys by the constitution of its nature — the law of self-protection. To secure enjoyment and avert evil, are the mainsprings of all animate activity, and these were the motives which governed men in their earliest economic schemes.

It is true that this describes not only man's early struggles for subsistence, but his present character and condition. The unphilosophic observer of the economic facts of to-day is filled with disgust and indignation at the false and pernicious mania for getting possession of the wealth already produced. He has no patience with the man who will labor as hard, and scheme as adroitly, and worry out his whole life as anxiously, to draw the property that other men have created into the eddy of his powerful avarice, as would have been necessary to produce it. He finds no words of condemnation strong enough to characterize the millionaire or the miser, the speculator or the stock-jobber. He forgets that all these are obeying this same biological law, uninfluenced by rational thought and unaided by any knowledge of economic principles. . . .

NATURAL JUSTICE, OR THE LAW OF FORCE

The law of force thus stated is an essential part of the law of acquisition, and inheres in the psychic process. Its method may be denominated *natural justice*, as distinguished from the popular conception of justice, which we may call civil justice. . . .

TRANSITION FROM NATURAL JUSTICE TO CIVIL JUSTICE

The specific problems of social mechanics are, of course, many of them highly complex; but the predominant

influences which tend to modify the general theory of natural justice in all states of society at all advanced may be referred to one common source, and, when this is well understood, they may then be subdivided into a few obvious groups.

The leading factor which distinguishes the conduct of men from the acts of animals is the greater predominance of the *intellectual* element. . . .

In endeavoring to analyze this influence, we find that it may be subdivided into three quite distinct constituents, each of which has done its part to make the conduct of men what it is with respect to the acquisition of the objects of desire. These three subordinate influences are as follows:

1. Increase in the susceptibility to sympathy.
2. Increase in the capacity for foretelling effects.
3. Decrease of the power to perform desired acts.

Restriction of Acquisitive Powers. — The third and perhaps most important influence which has tended to mitigate the law of natural justice has been the gradual restriction of the acquisitive power. While Sympathy has done much toward this end, and Intelligence has aided at least in a negative way, the sense of insecurity and the necessity for protection have been the chief elements in rendering it successful. . . .

GENESIS OF CIVIL JUSTICE

We are now prepared to consider the question, How far has *natural justice*, or the "right of might," been modified by the transition to civil justice? The chief effect produced by social regulation in altering the methods of acquisition has been the substitution of cunning for brute force. . . .

But why can men no longer seize property? Because of social organization, of course. Does not the fact of social

organization, then, argue a disinterested morality? Not at all. All this has been a growth. Once it did not exist. It owes its development to that of intelligence. Protective regulations are products of human sagacity, manifestations of the intellectual force. They constitute the method which mind was compelled to adopt in order to thwart mind. . . .

The exact method of their adoption or enforcement is quite immaterial. They have grown up in society, have been the results of human sagacity, cunning, or intelligence, have been devised by the victims of these same attributes, and have become binding upon all the members of society. It is to these three *codes*, as I denominate them, that civilized society owes its protection of rights and its immunity from arbitrary violence. Let us examine these codes a little more closely.

The *civil code* embraces the whole body of the laws which it is the province of government to establish, sanction, and enforce. . . .

What I understand by the *social code* is, that body of rules, limitations, and conditions which society has gradually built up to cause its members to observe *propriety* in all their acts. . . .

The *moral code* is designed to limit the members of society in the commission of actions which tend to cause pain or deprive of pleasure. . . .

All three of these codes, or systems of law, with their multiplied general and special regulations, and their inevitable penalties, are but the restrictions which society has placed upon its own action. . . .

It has been shown that the law of acquisition — *i.e.* the desire to acquire regardless of the method — is as strong now as ever, and that the progress made has consisted in mitigating the harshness of the method. We now see that this change of method has not been voluntary and due to altruistic impulses, but is chiefly com-

pulsory and the result of an actual inability to apply barbarous methods.

This brings us to the consideration of what may be be called the major evils which the love of gain has wrought. When we look over society and behold the condition of different classes of the people, the exceeding indigence of the poor and the exceeding opulence of the rich — when we reflect that throughout the world the tendency of civilization itself is to "make the poor poorer and the rich richer," and that all this is done according to law, in obedience to all three of the codes described and to the conscience — how can we longer doubt that the human race is just as eager for gain and just as indifferent as to the manner of securing it as it ever could have been in the most barbarous ages? . . .

Let us pause and ask the cause of this pecuniary inequality. One says it is because some have more brains than others, and know how to acquire and take care of property. I accept this as a partial explanation, and in so far as it is true it can be stated in this manner: Some have more (intellectual) power than others, and by means of it they withdraw property from the weaker ones according to the law of acquisition above set forth. This is the sociological form of stating the fact, and, if the advocates of brain-titles can derive any consolation from it, they are welcome to enjoy it. . . .

This "money-making" faculty of the human mind only represents the brute-force which was exerted as long as it availed for seizing, or, in any way whatever, getting possession of property. And the phenomena which it presents are as natural, when viewed from a sociological standpoint, as are those of magnetism. It is not the best things in the world that succeed best. It is not always the most perfectly organized species of animals that survive, nor the least perfect that are extinguished. In human attributes, as in animal organisms, it is those that are best

adapted to the particular circumstances of their existence that thrive best and propagate most rapidly. . . .

The time has not yet fairly come when the finer and nobler qualities shall be those best fitted to preserve, strengthen, and perpetuate themselves. We are still in that part of the great circuit of psychological development where the coarser and ruder qualities are those best adapted to achieve success. We have passed through the stage when muscle prevailed over brain, but we have not yet reached that in which reason shall prevail over passion.

The passion of avarice, whose genesis we have been tracing, is a normal product of the great preservative force. It is the power which nature is employing to preserve the human species, and can only be checked and made harmless by the intervention, or rather the supervention, of the higher, more subtile, and more penetrating intellectual attribute whose deeper calculations shall outwit the coarse cunning which expends itself on gain, even as this latter has supplanted the clumsy dynamics of muscle. In each and all of these cases, however, it must be force in one form or another that is to triumph; but that force is destined to grow more and more refined and spiritualized, until, let us hope, it will at last secure the object of man — his happiness — as it always must that of nature — his preservation.

The pecuniary inequality of mankind, therefore, sociologically considered, is likewise the result of the natural operation of the preservative forces under the peculiar conditions to which the race is subjected. Viewed from a biological standpoint, it has been man's greatest blessing; viewed from a moral standpoint, it has been his greatest curse.

But, when we say that the pecuniary inequality of mankind is due to a corresponding inequality of brain-power, even if we limit this brain-power to the "money-making" quality alone, we have gone a great way too far.

We have left out one of the most important elements in the problem. We have only stated the subjective side of the question, and have neglected the objective side. We shall never be wholly right until we remember that this inequality of possession is due to a corresponding inequality of *circumstances*. The inequality of brain-power is only the subjective part of these circumstances. We must also consider the objective part, the external circumstances which surround each individual, whether belonging to the fortunate or the unfortunate class. When we find that a great part, perhaps the greater part, of this painful inequality is the result of mere accident, as devoid of mental or moral character as are the inequalities of the earth's surface; due to some bare fortuity, some physical fatality, some accidental coincidence, some ancient social convulsion, some act of remote ancestors, or some vice or virtue of parents — when we look at this aspect of the question, it requires the broadest charity as well as the profoundest philosophy to refrain from exclaiming with Tully, *O tempora! O mores!* When we reflect upon these immense sociological facts, we realize more and more that there is a dark side to the picture presented by the operations of the preservative force, we see more and more clearly that in its grand career of development civilization has left a blackened trail and smoking ruins in the domain of feeling.

I have now completed the outline, which I had proposed to myself, of the operations of the preservative forces of society. I have shown how man in his perpetual pursuit of subsistence has organized and carried forward a grand economic system, and how all this imposing material civilization which we see around us is but the magazine which he has built and the stores which he has placed in it in order to escape the pains of hunger and cold. And, while it must be admitted that a vast deal of this goes to

the gratification of higher and more refined desires than those of eating and of being comfortable, still, these higher pleasures are all subservient in an indirect way to the same ultimate end, the preservation and security of vital existence. Anything which can be shown to have any, even the least, influence in placing human life upon a surer footing, is a proper element of preservation. As a general principle, it may be assumed that whatever tends to refine, elevate, or perfect the race, diminishes the chances of its ever suffering extinction.

TITLE II C: COLLECTIVIST AND SOCIALIST THEORIES

CHAPTER XIX

A SURVEY OF SOCIALIST THEORIES OF PROPERTY [1]

In any forecast that may be attempted of the probable influence of democracy in the world, a foremost place must be given to its relations to labor questions, and especially to those socialist theories which, during the last twenty years, have acquired a vastly extended influence on political speculation and political action. These theories, it is true, are by no means new. Few things are more curious to observe in the extreme Radical speculation of our times than the revival of beliefs which had been supposed to have been long since finally exploded — the aspirations to customs belonging to early and rudimentary stages of society.

The doctrine of common property in the soil, which, under the title of the nationalization of land, has of late years obtained so much popularity, is avowedly based on the remote ages, when a few hunters or shepherds roved in common over an unappropriated land, and on the tribal and communal properties which existed in the

[1] [By William E. H. Lecky: born near Dublin, March 26, 1838; died October 22, 1903.

His works include: "The Leaders of Public Opinion in Ireland" (1861); "History of the Rise and Influence of the Spirit of Rationalism in Europe" (1865); "History of European Morals from Augustus to Charlemagne" (1869); "History of England in the Eighteenth Century" (1878–1890).

The selection above reprinted is from his "Democracy and Liberty" (London: Longmans, Green, & Co., 1896), vol. II, pages 224–361 (parts omitted).]

barbarous or semi-barbarous stages of national development, and everywhere disappeared with increasing population, increasing industry, and increasing civilization. . . .

Probably the oldest and most important phase of the long battle for human liberty is the struggle to maintain individual rights of property and bequest against the inordinate claims of the ruling power. The very essence of unqualified despotism is the claim of the supreme power of the State, whatever it may be, to absolute power over the property of all its subjects. In opposition to this claim, the rights of the individual and the rights of the family to property have from the very dawn of civilization been opposed, and they form the first great foundation of human liberty. . . .

In modern Socialism such rights are wholly ignored, and the most extreme power over property ever claimed by an Oriental tyrant is attributed to a majority told by the head. There are men among us who teach that this majority, if they can obtain the power, should take away, absolutely and without compensation, from the rich man his land and capital, either by an act of direct confiscation or by the imposition of a tax absorbing all their profits; should abolish all rights of heritage, or at least restrict them within the narrowest limits; and should in this way mold the society of the future.

This tendency, in the midst of the many and violent agitations of modern life, to revert to archaic types of thought and custom, will hereafter be considered one of the most remarkable characteristics of the nineteenth century. . . .

THE UTOPIAS

A considerable literature of Utopias, however, pointing to ideal states of society, arose. The "Utopia" of More, which appeared at the end of 1515, led the way. It was

obviously suggested by the "Republic" of Plato, and, in addition to its great literary merits, it is remarkable for many incidental remarks exhibiting a rare political acumen, and anticipating reforms of a later age. It was in the main a picture of a purely ideal community resting upon unqualified communism. Money was no longer to exist. All private property was to be suppressed. The magistrates were to determine how much of this world's goods each man might possess, and how long he might hold it. No town was to be permitted to have more than 6000 families, besides those of the country around it. No family must consist of less than ten or more than sixteen persons, the balance being maintained by transferring children from large to small families. Houses were to be selected by lot, and to change owners every ten years. Every one was to work, but to work only six hours a day. All authority was to rest on election. Like Plato, More considered a slave class essential to the working of his scheme, and convicts were to be made use of for that purpose.

Many other writers followed the example of More in drawing up ideal schemes of life and government, but they were much more exercises of the imagination than serious projects to be put in force. They formed a new and attractive department of imaginative literature, and they enabled writers to throw out suggestions to which they did not wish formally and definitely to commit themselves, or which could not be so easily or so safely expressed in direct terms. Bacon, Harrington, and Fénelon have all contributed to this literature, and traces of the communistic theories of More may be found in the great romance of Swift. About a century after the appearance of the "Utopia" of More the Dominican monk Campanella published his "City of the Sun," which was an elaborate picture of a purely communistic society, governed with absolute authority by a few magis-

trates, and from which every idea of individual property was banished. Like Plato, however, Campanella made community of wives an essential part of his scheme; for he clearly saw, and fully stated, that the spirit of property would never be extirpated as long as family life and family affection remained.

It is not probable that a literature of this kind exercised much real influence over the world; nor need we lay great stress upon the small religious communities which in Europe, and still more in America, have endeavored to realize their desire for a common life. In the vast mass of political speculation that broke out in the eighteenth century there were elements of a more serious portent. "The Spirit of the Laws," which appeared in 1748, was by far the most important political work of the first half of this century; and in the general drift of his teaching Montesquieu was certainly very much opposed to the communistic spirit. . . .

ROUSSEAU

Rousseau is more commonly connected with modern communism, but the connection does not appear to me to be very close. It is true that in his early Discourse on inequality he assailed private property, and especially landed property, as founded on usurpation and as productive of countless evils to mankind; but the significance of this treatise is much diminished when it is remembered that it was an elaborate defense of savage as opposed to civilized life. In his later and more mature works he strenuously maintained that "the right of property is the most sacred of the rights of citizens, in some respects even more important than liberty itself"; that the great problem of government is "to provide for public needs without impairing the private property of those who are forced to contribute to them"; that "the foundation of the social compact is property, and that its first condition is that

every individual should be protected in the peaceful enjoyment of that which belongs to him." In the "Contrat Social," however, he maintains that by the social contract man surrenders everything he possesses into the hands of the community; the State becomes the basis of property, and turns usurpation into right; it guarantees to each man his right of property in everything he possesses, but the right of each man to his own possessions is always subordinate to the right of the community over the whole. . . .

SAINT-SIMONISM

The keynote of the social philosophy of Saint-Simon was that the social organization of Europe which had existed in the Middle Ages, under the auspices of Catholicism and feudalism, was now hopelessly decayed, and that the reorganization of Europe on a new basis, and in the interest of the poorest and most numerous class, was the supreme task of the thinkers of our age. Like Comte, he had a great admiration for the Middle Ages. He was impressed by the unity, the completeness, and the harmony of the organization imposed by the Church on all the spheres of thought and action. The beliefs on which this system rested had irrevocably gone, but he believed that it might be reproduced on another foundation, and that this reproduction would confer incalculable blessings on mankind. "The golden age," he said, "is not, as the poets imagine, in the past, but in the future."

His ideas, however, about the nature of this reorganization varied greatly at different periods of his life. In his first scheme, which was propounded in 1803, he urged that society should be divided into three classes, all spiritual power being placed in the hands of the learned, and all temporal power in those of the territorial proprietors, while the right of electing to high offices in humanity should be vested in the masses. . . .

The next scheme was of a different character. It transferred all power from the hands of the territorial aristocracy to those of the representatives of industry. Labor was to be universal; all who lived in idleness were branded as robbers; and society was to be divided into two classes — the learned, who were to be engaged in investigating the laws of Nature, and the industrial, who were to be engaged in different forms of production. "Everything by industry — everything for industry," was adopted as the motto. The military system was denounced as an anachronism descending from the days of feudalism; all standing armies were to be abolished, and great public works transforming the material world were to take the place of the military enterprises of the past. Society was to be purely industrial, qualified only by the directing influence of the learned classes, who were to hold in the new society a position analogous to that of the clergy in the past. All hereditary privileges were to be abolished. Education on the largest scale was to be undertaken by the Government; and it was also to be its duty to assure work to all who, without its assistance, were unable to find it. . . .

It is not necessary to dwell at length upon the system of Fourier, which was contemporaneous with Saint-Simonism. He proposed to divide the world into a vast number of industrial communities, called *Phalanges*, in which each man was to do very much what he liked the best, but in which allurements and incentives were to be so skillfully distributed, education so admirably organized, aptitudes and capacities so wisely consulted, regulated, and employed, that each man would find his highest pleasure in work which was for the benefit of the rest. It is a system which might be applicable to some distant planet inhabited by beings wholly unlike mankind. It may be realized on this planet in a far-off millennium if, as some philosophers think, human nature can be funda-

mentally transformed by many successive modifications of hereditary characteristics; but in our age and world it is as unreal and fantastic as a sick man's dream.

ROBERT OWEN

Robert Owen deserves a more serious consideration. He was in real touch with practical life, having been a large and successful manufacturer in that very critical period of English industry when the great inventions of the close of the eighteenth century had given the death-blow to the domestic industries, and laid the foundations of our present factory system; when the complete command of the sea which England obtained during the long French war had given an unparalleled impulse to her manufactures; and when, at the same time, the new conditions of labor were most imperfectly organized, and scarcely in any degree regulated by law. Frightful abuses, especially in the form of excessive child labor, took place, and the vast masses of wholly uneducated men, women, and children, withdrawn from their country homes and thrown together amid the temptations of great towns and of untried and unaccustomed conditions of industry, presented moral, political, and social dangers of the gravest kind. . . .

His first scheme was simply an extension of the poor law, enacting that every union or county should provide by county expenditure a large farm, if possible with a manufactory connected with it, for the employment of the poor, and he believed that these would speedily prove self-supporting. He afterwards advocated the establishment all over the country, by private subscription, of industrial colonies, or communities, in which agriculture, manufacture, and education were all to be carried on, and in which, by common labor, common living, and common expenditure, the cost to each member might be greatly reduced.

This scheme attracted a large share of public attention in England in the second and third decades of the nineteenth century. It was taken up by several wealthy and philanthropic men, it engaged the attention of Parliament, and it found several supporters on the Continent. Owen, however, impaired his cause greatly by the unnecessary vehemence with which he put forward his very heterodox religious opinions. . . .

In 1824, Owen went to the United States, where he remained for about three years. In a thinly populated country, where there was much less stress of competition and much less organization of industry than in Europe, the chances of success seemed greater, and eleven industrial communities were established, either by Owen or by men who were under his influence. They all of them signally failed, and the average duration of the eight principal ones is said to have been only a year and a half. . . .

The first very striking success in this department was the Rochdale Pioneers. It was founded, in 1844, by a few poor men who, in a time of great trade depression, clubbed together to purchase their tea and sugar and other necessaries at wholesale prices. There were at first only twenty-eight of them, and each subscribed 1*l*. They proposed, as their association extended, to manufacture such articles as the society might determine, to buy land for the employment of unemployed laborers, to promote sobriety by the establishment of a temperance hotel, and generally to assist each other in their social and domestic lives. As they became more successful they assigned a certain proportion of their profits to educational purposes. The society gradually grew into a vast store, which in 1882 counted 10,894 members, sold merchandise of the value of 274,627*l*., made 32,577*l*. of profits, and paid a dividend of 5 per cent upon its capital, besides distributing considerable sums among its clients. The example was widely followed, and the progress of the coöperative

movement, reconciling many hostile interests, is one of the most hopeful signs of our day. It would be easy to exaggerate, but it would be unjust to deny the part which the teaching of Robert Owen has had in promoting it.

FRENCH SOCIALISM

In France, ideas of a socialistic order were at this time perhaps more prevalent than in England. The current of ideas in the direction of Socialism may be traced through much of the higher French literature of the period. It is very perceptible in some of the novels of George Sand, and in some of the songs of Béranger; but the writers who at this time most powerfully affected opinion in the direction I am indicating were Lamennais and Louis Blanc. It would be difficult to find in all literature more fiery, more eloquent, and more uncompromising denunciations of the existing fabric of society than are contained in the later writings of Lamennais. . . .

Similar views were preached with less eloquence, but with more system, and in a scarcely less declamatory form, by Louis Blanc, whose work on the "Organization of Labor" appeared in 1845. He thought that competition was the master-curse of the world and the chief cause of the degradation and slavery of the poor. According to him, modern society was sick even to death. All its chief institutions were gangrened with corruption and egotism. The condition of the poor was intolerable, and under the pressure of competition their wages must inevitably sink till they touch the level of starvation. In the face of the plainest facts he maintained that their situation was everywhere and steadily deteriorating; and while drawing the most harrowing pictures of their misery, he did all in his power to discredit the methods by which practical and unpretending philanthropy has labored to mitigate it. . . .

The real remedy for the ills of society is to be found in

an enormous aggrandizement of the powers and duties of the State. By the expenditure of vast sums of public money it should establish great industrial organizations, which will gradually overshadow, absorb, and crush all private industries. It must supply the capital, give ample wages, quite irrespective of market value, to all who are employed, and forbid all competition, either within or between these different national organizations. . . .

In the meantime, all collateral successions are to be forbidden, and the money diverted to the coffers of the State. Successions in the direct line, however, must be preserved until society has gone through the process of transformation, when they too will disappear. They are an evil, but at present a necessary, though a transitory one. "Heredity is destined to follow the same path as societies which are transformed, and men who die." Mines, railways, banks, insurance offices, are to be taken over by the State, and a great State bank is to lend money to laborers without interest. Education is to be free and compulsory. A fixed proportion of the product of the national workshops is to be reserved for the support of the old and of the sick. Literary property is to be at once abolished, one of the principal reasons being that it is degrading to a writer. Louis Blanc, it may be added, utterly repudiated the Saint-Simonian formula, "to each man according to his capacities," substituting for it, "to each man according to his wants" — a conveniently elastic phrase, which might be contracted or expanded almost without limit.

These views have not even the merit of originality. They are, for the most part, a medley of the doctrines of Saint-Simon, Fourier and Morelly. . . .

GERMAN SOCIALISM

After this time the storm-center of Socialism passed from France to Germany, where it chiefly gathered around

two men — Lassalle and Marx. They had, no doubt, some precursors, and, among others, Fichte had thrown out in passing some views very like those of the modern Socialists; but these views had taken no real root in the German mind. . . .

Lassalle made it his object to persuade the working classes that political ascendency should be their first object; that the Revolution of 1848 should be their guiding light; and that by steadily pursuing this path the means of production and the wealth of the world would soon be at their disposal. Industry and thrift, he maintained, could never permanently improve their position, for it is a law of political economy that wages always tend to the level needed for the bare subsistence of the workman, and every economy in subsistence, every working-class saving, would in consequence be followed by a corresponding depreciation of wages. This was "the iron law of wages," against which industry and thrift would beat in vain until industrial society was completely reorganized. Profit is merely the portion of the produce of the laborer which is confiscated by the employer, and that portion will continually increase. Machinery, bringing the "great industry" in its train, has vastly aggravated the evil. It has introduced an era of great profits, and great profits simply mean increased spoliation of the producer. It has placed the worker more and more in the hands of the capitalist, establishing a slavery which is not the less grinding because it is maintained, not by law, but by hunger. The wealth of the world may increase, but, unless society is radically revolutionized, the part of the laborer must become continually less. "The back of the laborer is the green table on which undertakers and speculators play the game of fortune." "The produce of his labor strangles the laborer. His labor of yesterday rises against him, strikes him to the ground, and robs him of the produce of to-day."

These doctrines lie at the root of most of the socialistic speculation of our time; and if the stream of humanity moved blindly on, with as little providence or self-restraint as the beasts of the field, a great part of them would be perfectly true. In a thriftless and redundant population, multiplying recklessly in excess of the means of employment, the wages of unskilled labor will undoubtedly sink to the level of a bare subsistence. But this is manifestly untrue of a population which multiplies slowly, and of a country where capital and employment increase more rapidly than population. As Cobden truly said, when two laborers run after one employer, wages will fall. When two employers run after one laborer, they will inevitably rise. As a matter of fact, the general rise of wages in Europe during the nineteenth century, both in nominal value and real value, has been undoubted and conspicuous, and the large and rapidly growing amount of workingmen's savings has been not less clearly so. In no countries have these things been more marked than in those in which manufactures are most developed and in which machinery is most employed. . . .

Lassalle left behind him many admirers, though, on the whole, the strongest influence in German Socialism was Karl Marx, the founder of what Socialists call "scientific" Socialism. Lassalle desired a purely German movement, and he was passionately devoted to the idea of a united Germany. It was the great object of Marx to denationalize the working classes, obliterating all feelings of distinctive patriotism, and uniting them by the bond of common interests, common aspirations, and common sympathies in a great league for the overthrow of the capitalist and middle class. According to his view of history, the laboring class had, in all ages, been plundered or "exploited" by the possessors of property. This tyranny at one time took the form of slavery, at another of serfdom, at another of the "corvées" and other burdens

of feudalism. In modern times it takes the form of the wage system, by which the laborer is compelled to work for the benefit of the rich. But democracy has come, and the most numerous class will soon become the most powerful, if they unite in all countries, and discard the sentiments and the divisions of local patriotism. The event to which the disciples of Marx are accustomed to point as realizing the best their denationalizing teaching is the Commune, when the French proletariat found their opportunity, in the crushing disaster of their country, to attempt a revolution in the interests of their order. It is an event still much commemorated and honored in the more uncompromising socialistic circles, and they justly boast that men molded in their principles took the leading part in accomplishing it. . . .

Marx, towards the end of his life, employed himself in writing his elaborate treatise on Capital, of which the first volume was published by himself, and the conclusion, after his death, by his disciples. The work is, as might be expected, a furious attack upon capital. It describes it as wholly due to violence or fraud, extending through the whole past history of the globe. Marx recognizes no such thing as prescription. The frauds, the violence, the unjust confiscations of a remote past are brought up against peaceful and industrious men who for many generations have bought, sold, borrowed, and let with perfect security on the faith of titles fully recognized by law, and absolutely undisputed within the memory of man. The most serious vice of capital is, however, not derived from the past. It lies in the present confiscation of labor and its fruits, which, according to Marx, is its essential characteristic. To understand his position it is necessary to consider his law of value. He distinguishes between the "use value" of a thing and its "exchange value," and exchange value, he maintained, can only be created in one way. This way is by labor. All com-

modities are merely "masses of congealed labor-time," and derive their whole exchange value from the labor bestowed on them. "The value of every commodity is determined by the labor time necessary to produce it in normal quantity." "Commodities in which equal quantities of labor are embodied, or which can be produced in the same time, have the same value." "All surplus value, under whatever form it crystallizes itself — interest, rent, or profit" — is only the "materialization" of a certain amount of unpaid labor time.

Two startling consequences spring from this doctrine. One is, that commerce can never produce a surplus value, or, in other words, increase wealth. It merely moves from one quarter to another a fixed amount of value, or "congealed" labor power. . . .

In what way, then, is capital formed? The answer is, that it is simply the unpaid and confiscated labor of the laborer. The capitalist, having obtained command of the means of production and subsistence, is able to buy at the price of a bare subsistence the whole labor-time of the laborer. By right the capitalist has no claim to profit, or to anything beyond the mere sum required for keeping up his machinery. In fact he is able to exact far more. The laborer works, perhaps, for ten hours. In five hours he probably produces an equivalent to his subsistence, and he receives that amount of the produce of his labor in the shape of wages. For the other five hours he receives nothing, and the whole produce of his labor is appropriated by the capitalist. "Wages by their very nature always imply a certain quantity of unpaid labor on the part of the laborer." It is an illusion to suppose that the laborer is paid by the capitalist out of his capital. This would, no doubt, be the case if he were paid in advance. As a matter of fact, he is paid only at the end of his day's, or week's, or month's work, and he is paid entirely out of his own earnings. He receives only what he has him-

self made, or its equivalent. Every shilling that is made by him is merely the equivalent of commodities which he has already produced; but he has produced many commodities besides, for which he obtains no return, and this constitutes the profit of the capitalist. . . .

To sum up the position Marx assures us that "capital is dead labor, that, vampire-like, only lives by sucking living labor, and lives the more, the more labor it sucks." It is "the vampire which will not lose its hold on the laborer so long as there is a muscle, a nerve, a drop of blood to be exploited." "In proportion as capital accumulates, the lot of the laborer, be his pay high or low, must grow worse. . . . Accumulation of wealth at one pole is, therefore, at the same time accumulation of misery, agony of toil, slavery, ignorance, brutality, mental degradation at the opposite pole — *i.e.* on the side of the class that produces its own product in the form of capital." "As in religion man is governed by the products of his own brain, so in capitalistic production he is governed by the products of his own hand".

The doctrine of Marx is, in its essential features, the received and recognized doctrine of the great body, not only of German, but of French Socialists. It is the basis of the teaching of Mr. Hyndman and some other Socialist writers in England, and it has a considerable and probably a growing body of adherents in nearly every country. Marx is described by his followers as the new Adam Smith, another and a greater Darwin, the author of "The Bible of Socialism. . . ."

FALLACIES OF THE MARXIAN THEORY

In their whole treatment of wages, Marx and his school fall into the grossest fallacies. They announce as a great discovery, that the laborer is not paid out of capital, but out of his own earnings, because he produces the equivalent, or more than the equivalent, of

his wages before he receives them. This statement is most obviously untrue in a vast proportion of industrial employments. The laborer who is employed in laying down a railway, or building a house or a ship, or constructing a machine, or preparing a field for the harvest of the ensuing year, or contributing his part in the beginning of any one of the countless enterprises which only produce profit in a more or less distant future, is certainly paid from capital, and not out of what he has himself produced. His work may or may not hereafter produce its equivalent, but it has not done so yet. If capital is not there to pay him, his labor will never be required. It is true that the work of a miner who raises daily a given amount of coal, or of the factory laborer who turns out daily a given number of manufactured commodities, rests on a somewhat different basis; but it is not less true that the mine would never have been opened, that the factory would never have been built, if capital had not been there to do it, and to provide the costly machinery on which the whole of the labor depends. Nor is this a complete statement of the case. The commodities which the workman has produced can pay no wages as long as they are unsold. It is the error of Marx and his school that they treat the question of wages as if it depended only on two parties — the manufacturer and the laborer. A third party — the consumer — must come upon the scene, and wages, profits, and employment will alike fluctuate according to his demand. . . .

Capital, indeed, which is denounced as the special enemy of the working man, is mainly that portion of wealth which is diverted from wasteful and unprofitable expenditure to those productive forms which give him permanent employment. The mediæval fallacy that money is not a productive thing, and that interest is therefore an extortion, might have been supposed a few years ago to have been sufficiently exploded. As Bentham

long since said, if a man expends a sum of money in the purchase of a bull and of a heifer, and if as the result he finds himself in a few years the possessor of a herd of cattle, it can hardly be said that his money has been "unproductive." If he expends it in stocking his lake with salmon or his woods with some valuable wild animal which needs no human care, this increased value may be created without the intervention of any human labor. The wine in a rich man's cellar, the trees upon his mountains, the works of art in his gallery, will often acquire a vastly enhanced value by simple efflux of time. Usually, however, capital and labor are indissolubly united in the creation of wealth, and in all the larger industries each is indispensable to the other. It may be truly said that it is not the steam engine, but the steam, that propels the train so swiftly over the land; but the statement would be a very misleading one if it were not added that the steam would be as powerless without the engine as the engine without the steam. If a man by the possession of a sum of money is able to start a business which gives a profit of 8 or 10 per cent, and if he borrows this sum at 4 or 5 per cent, can it be denied that the transaction is a legitimate one, and beneficial to both parties? If a workman is able to produce by the aid of a machine 100, or perhaps 1000 times as much as he could produce by his unassisted hands, is it unnatural that some part of the profit should go to the capitalist who has supplied the machine, or to the inventor who conceived it? The great evil of the capitalist system, the Socialists say, is that the workman is more and more unable to purchase by his earnings the result of his own labor. The answer is, that by his unassisted labor he could barely have produced the means of living, while by the aid of machinery his powers of production are incalculably multiplied. Commerce, according to Marx, can produce no surplus value, for the labor-time spent on what is exchanged remains

unaltered. But if Newcastle coal which is worth 1000*l.* at the pit's mouth is exchanged for Brazilian coffee which costs 1000*l.* on the plantation, can it be said that the coal-owner and the coffee planter have gained nothing by a transaction which gives each of them a rare and valuable commodity, instead of one which was cheap and redundant? Can any statement be more palpably untrue than that equal quantities of labor produce equal values — the labor of Raphael, and the labor of a signboard painter; the labor which is employed in the manufacture of some rare and delicate instrument, and that which is employed in carrying bricks or sweeping roads; the labor which taxes the highest faculties of the human mind, and the labor of a plodding fool; the labor which involves grave danger to the laborer, and the labor which asks nothing but patience and brute strength?

Another great fallacy which pervades the teaching of Marx and of his school is to be found in their enormous exaggeration of the proportion of the produce of labor which, in every manufacturing industry, falls to the share of the capitalists. If their estimate was a just one, every manufacture which employs much labor would prove lucrative, and every addition of salaried labor would largely increase profit. It is one of the most patent of facts that this is not the case, and that a vast proportion of the employers of labor end in bankruptcy. If the profits of capital, as distinguished from labor, were what Socialists represent them, coöperative workingmen's associations would speedily multiply, for, by placing labor and capital in the same hands, they would almost inevitably succeed. The coöperative movement has, no doubt, largely extended, and it is one of the most hopeful signs of the industrial future. But can any one who has followed its history, who has observed the great multitude of these societies that have totally failed, and has computed the gains of those which have succeeded, conclude

that their success has been on such a scale as to show that those who participate in them gain far more than salaried laborers? Perhaps their greatest economical superiority is to be found in the lessened probability of wasteful strikes.

There are two elements which, in estimating the capitalist system, Marx and his followers systematically ignore. One is the many risks that attend industrial enterprise. Too often, also, it is the very men who have deserved best of the community who suffer. How often does an original inventor find his great idea appropriated by another who, by devising some improvement in detail, some simplification and economy of mechanism, is able to drive him ruined from the field? . . .

In truth, the part which has been played by the great captains of industry in the wealth formation of the world can hardly be exaggerated, and, in most cases, the success or failure of an important industrial enterprise will be found to depend far more on its organization and its administration than on any difference in the quality of its labor. The man who discovers among a thousand possible paths of industry that which is really profitable; who possesses in a high degree promptitude and tact in seizing opportunities and foreseeing change; who meets most successfully a popular taste or supplies most efficiently a widespread want; who invents a new machine, or a new medicine, or a new comfort or convenience; who discovers and opens out a new field of commerce; who enlarges the bounds of fruitful knowledge; who paints, among a thousand pictures, the one that fascinates the world; who writes, amid a thousand books, the one which finds a multitude of readers, is surely a far greater wealth-producer than the average laborer who is toiling with his hands. It is by such men that, in modern times, great fortunes are most frequently made, and the skill that determines the wise application of manual labor is as much needed as the labor itself.

The delusion that all wealth is the creation of manual labor may be supported by great names, but it is one of those which a careful analysis most conclusively disproves. The true sources of wealth are to be found in all those conditions which are essential to its production, and in the great and complex industries of modern life these conditions are often very numerous. . . .

HENRY GEORGE

These three countries [England, France, and Germany] are now the special centers of the socialist movement, but in most other countries a similar tendency may be traced. . . .

In the United States also it has made some progress, though it would be scarcely possible to conceive a nation where the spirit of individualism is more strongly developed and the spirit of competition more intense. America had long been the refuge of an immense proportion of the banished Anarchies of Europe, and it presents the curious spectacle of a country where the working-class, at least in its lower levels, consists mainly of foreigners or children of foreigners. At the same time, the most prominent type of American Socialism does not appear to have been created by direct foreign propagandism, though its leading doctrine had long since been anticipated on the Continent. The great popularity and influence of the writings of Mr. George, on both sides of the Atlantic, have been a remarkable fact. It is largely due to the eminent literary skill with which he has propounded his views, and described and exaggerated the darkest sides of modern industrial life, and partly also, I think, to the general ignorance of Continental Socialist literature, which has given his doctrines something of the fascination of novelty. His fundamental proposition is that, the soil not having been made by man, and having in the beginning of human society been a common property (as it still is in most savage nations), should be taken by the community,

without compensation, from its present owners, although it has been recognized as private property for countless generations; although it has been bought, sold, inherited, and mortgaged on the faith of the most undisputed titles; although the earnings and savings and labor of innumerable industrious lives have been sunk in its improvement, and have given it its chief present value; although its existing rent represents, in innumerable cases, nothing more than the lowest, or almost the lowest, rate of interest on the sum actually expended upon it within the memory of living men. . . .

This scheme of plunder, as we have seen, is by no means original. It had long been a leading article in the Socialist programs of Germany and France, and the Continental Socialists, long before Mr. George, had clearly seen that it could be carried out by the simple process of imposing a special tax on land, equivalent to its full rent value. The doctrine that wages are not paid from capital, but from earnings, on which Mr. George lays so much stress, is merely the doctrine of Marx; nor is there any originality in Mr. George's proposal that nations should still further improve their condition by defrauding their creditors and repudiating their debts. It is "a preposterous assumption," he assures us, "that one generation should be bound by the debts of its predecessors." That all the profits of production of every kind must ultimately center in the possessors of land (who must, in consequence, be reaping the most enormous wealth) is a doctrine which belongs more distinctively to Mr. George; but his statements that wages are steadily tending to the minimum of subsistence, the condition of the working-classes steadily deteriorating, and society rapidly dividing into the enormously rich and the abjectly poor, have been abundantly made in Europe, and will, no doubt, long continue to be repeated, in spite of the clearest demonstrations of their falsehood. . . .

In some respects the writings of Mr. George differ widely from those of European Socialists. Mr. George does not wish to suppress competition, or individual initiative, or individual savings, and he desires rather to diminish than to extend the powers of Government. In those respects, indeed, he cannot properly be called a Socialist. All he asks from the Government is, that it should rob two great classes, appropriating the whole rent-value of land by a single tax, which should supersede all others, and repudiating its national and municipal debts. . . .

Mr. George is quite as ready as the German Socialists to plunder the capitalist. He maintains that the first act of the Federal Government, at the beginning of the War of Secession, ought to have been to provide for its expense by confiscating the property of all the richest members in the community who remained loyal to the Union; and no Continental writer ever advocated dishonesty to national creditors with a more unblushing cynicism. At the same time, capital, as distinguished from landowning, does not occupy in his system the same position as in the treatise of Marx. In the demonology of Marx the capitalist is the central figure. He is the vampire who sucks the blood of the poor, and absorbs all the wealth which more perfect machinery and more productive labor create. According to Mr. George, he can ultimately absorb none of this wealth, unless he happens to be a landowner. The interest and profits of the capitalist, as well as the wages of the laborer, can never, in the long run, increase while land remains private property. Some of my readers will probably doubt whether such a doctrine could have been seriously propounded, but the language of Mr. George is perfectly clear. "The ultimate effect of labor-saving machinery or improvements is to increase rents without increasing wages or interest." "Every increase in the productive power of labor but increases rent. . . . All the advantages gained by the

march of progress go to the owners of land, and wages do not increase. Wages cannot increase." "The necessary result of material progress — land being private property — is, no matter what the increase in population, to force laborers to wages which give but a bare living." "Whatever be the increase of productive power, rent steadily tends to swallow up the gains, and more than the gains." It is a general law, according to Mr. George, that wherever land is cheap wages will be high, and wherever land is dear wages will be low. It is obvious that, according to this law, wages must be far lower in London, in the great provincial towns, and in the country that surrounds them, than in Dorsetshire or Connemara; far lower in England and France than in Hungary, or Poland, or Spain! Mr. George assures us that the whole benefit of the increase of wealth which has taken place in England within the last twenty or thirty years has gone to a single class — the English landowners. It has not alleviated pauperism, but only increased rent. . . .

Mr. George devotes a special chapter to repudiating all idea of compensation to the "expropriated" landowner. In this he is perfectly consistent. The scheme of an honest purchase is, in fact, I believe, now universally abandoned; but some of the English disciples of Mr. George have proposed that, although the land should be taken by the State, an annuity of two lives, equal to its net revenue, should be granted in the form of a pension to the dispossessed owner and to his living heir. It is charitable to assume that this proposal is a serious one; but a man must have a strange conception of human nature if he imagines that a nation which had gone so far in adopting the principles and policy of Mr. George, would consent for a long period of years to burden itself with this enormous tax. Nor is the American Constitution one in which the firm fabric of property and contract can be overthrown by any transient ebullition of popular sentiment.

CHAPTER XX

THE PROGRAM OF COLLECTIVISM [1]

THE crafty minority which is forever seeking to plunder the uncrafty multitude has an interest in the prosperity of its prey; and it is generally when the governing minority fails to understand this that it is overthrown. The Indian tribes were as careful to preserve the herds of buffalo upon which they respectively depended for food as we have been reckless in destroying them. . . .

Government, unenlightened by religion, tends to be an application to human society of the art which the Indian applies to the herd of buffaloes; it is the alliance of selfish intelligence, or craft, with the natural predatory instincts of man in the intelligent minority, for the purpose of preying, to the greatest advantage to themselves, upon the majority, which does not possess this intelligence to the same degree. . . .

§ 1. THE CIVILIZING FORCE OF PRIVATE PROPERTY BY PROMOTING SELF-CONTROL.

The struggle for life is for the most part a struggle for food. If the supply of food were sufficient, attainable, and constant, there would be no struggle; but inasmuch as it tends to be insufficient, unattainable, and inconstant, the struggle for it is perpetual. The inconstancy of the

[1] [By EDMOND KELLY: born May 28, 1851 in Toulouse, Haute-Garonne, France.
The selection above reprinted is from his "Government or Human Evolution" (New York: Longmans, Green, & Co., 1901), pages 65–96, 111, 112, 131, 152–173, 216–17, 242–259, 257–533 (parts omitted).]

supply of food is the principal element in the struggle which gives rise to the instinct of accumulation.

Instinctive accumulation is more developed in social than in unsocial animals. The unsocial carnivora do bury their prey and return to it; they have a fierce sense of individual property in it, as is evident by the savageness with which they will fight for it. But their providence never goes to the point of laying in during the summer a supply of food for the winter, for the reason that the character of their food is such that it cannot be preserved by any device at their disposal during the necessary period; but even though their food were capable of preservation, solitary life does not furnish the possibility of coöperation necessary to large accumulation. Social animals, on the contrary, — that is to say, those which live in communities, — have the instinct of accumulation very strongly developed; and it is a matter of no small interest to notice that the process of accumulation *seems* to involve two qualities, both of which are conspicuous by their high development in man. These qualities are prudence and self-control. . . .

How far ants and bees are pure automata need not be discussed. It is only necessary here to contrast the habits of social with unsocial animals, — habits which, when we find them associated with consciousness and the moral sense in man, become recognized as virtues and their respective opposites. In this connection it may be usefully noted that if there is in ants any volitional power which could interfere with their apparently altruistic devotion to the community, it is embryonic; for as a matter of fact, we see these insects uninterruptedly doing the work of the community without apparently the possibility of doing otherwise; they seem for the most part to be undistracted by selfishness. We may set it down, then, as certain that the habits of carnivora tend to promote a fierce sense of private property in the products of the

chase; whereas the habits formed in communities seem to be such as to obliterate all sense of private property and to substitute therefor a sense of ownership in common.

The fierce sense of property in the female, or sexual jealousy, which characterizes the carnivora, has already been pointed out; and this has been contrasted with the singular and savage system by means of which the sexual jealousy arising therefrom has been eliminated in such communities as those of ants or bees.

The contrast between the social and the unsocial animal can be briefly stated as follows: the social animal, by the destruction of one sex, destroys the possibility of sexual jealousy and kills in embryo the sense of property in the female; and the sense of private property in the results of labor seems to be entirely replaced by a sense of ownership in common. The unsocial animals, on the other hand, are characterized by a fierce sense of property in the female, and of individual property in the products of the chase.

When we now turn our attention from lower animals to man, we cannot but be struck by the fact that they have solved both the problem of property in the female and the problem of property in the product of toil in very much the same way; that is to say, by the exercise of self-control. Nor must we fail to take account also of the fact that the exercise of self-control permits of their retaining the individualistic sense of private property with the social sense of State property also. . . .

Men are unequal not only in their power of self-control, but in the productiveness of their efforts, and in their ability to command the submission of others. They also differ in willingness to exercise self-control, in willingness to labor, and in willingness to submit to others.

The consequence of these inequalities must be that those who have great power of self-control, great power of productive toil, and great power of commanding the

submission of others will become the masters of those who are willing to labor and willing to submit.

This is the process by which the individualistic temperament developed by the possession of these powers is set upon subjugating the socialistic temperament and appropriating the benefits of society to its own use. But this process, on the other hand, tends to correct itself. The unresisted exercise of power takes away the necessity for self-control; and abuse of power destroys the willingness to submit to it. As self-control tends to disappear under such conditions, society is left to the struggle between opposing selfishnesses. But the disappearance of self-control makes the governing class cruel and weak, while abuse of power tends to make the governed class fierce and rebellious; so that the condition at last becomes one of unstable equilibrium. . . .

Hence, the same process tends to be repeated over and over again. . . .

Individualism is at once the cause of private property and its result. For while the individualistic temperament tends to create the sense of private property, the last reacts upon the individualistic temperament and reinforces it. . . .

There is but one conclusion to be drawn from this story: competition is inconsistent with complete liberty of contract; and complete liberty of contract is probably not attainable in this world at all.

Collectivists offer as a solution for this discouraging conclusion a system of government under which competition could be to the greatest degree possible eliminated through the abolition of private property in those things the ownership of which enables one set of men to control the lives of others. . . .

In South Australia all the farmer has to do when he wishes to send a box of butter, honey, or some sheep

abroad, is to write to the agricultural department, and if they are approved and forwarded, the consignor has nothing more to do but sit at home and await returns by check.[1]

The principle of extending the sphere of government so as to substitute coöperation for competition, as illustrated by this South Australian system, is the principle of collectivism; and those who believe in the possibility of ultimately extending this principle to its utmost limits look forward to a day when the State will own all so-called "sources of production," leaving to individuals property only in the things they for personal convenience and enjoyment use.

There is, however, a widespread ignorance as to the effect of this system, and it may, therefore, be well at once to point out that it is by no means so revolutionary as is generally imagined. For example, were the State sole owner of the land, there need be but little difference between our tenure under the State and our tenure to-day. Every man who occupies land under the present system contributes to the extent of his occupation to the maintenance of the State. This contribution[2] is called a tax to-day; in a collectivist State it would be called rent. . . .

Another widespread mistake regarding collectivism consists in the notion that it involves the division of property amongst the people. On the contrary, far from involving the principle of division or dissipation, collectivism is the embodiment of the principle of concentration. Mark Twain wittily objects to the proverb, "Don't put all your eggs in one basket," by substituting for it, "On the contrary, put all your eggs in one basket, but watch that basket." Collectivism proposes to vest in the State both land and capital, the private ownership

[1] Bulletin of the Academy of Political and Social Science, New Series, No. 10, p. 9.

[2] In France taxes are called just what they are, "contributions."

of which now sets man against man, and to vest it under conditions which will put men shoulder to shoulder in coöperative production, eliminating anxiety, diminishing toil, and permitting a leisure and a freedom for the promotion of knowledge, culture, and art which the world has not yet seen. Above all, the economy of time occasioned by such a system would permit every individual voter to exercise a watchfulness over the State which is impossible under existing conditions, and the impossibility of which is perhaps the principal cause of administrative mismanagement and political corruption.

Collectivists do not necessarily demand or expect that collectivism be introduced suddenly or by violent means into the State. On the contrary, temperate collectivists — and we may disregard the views of the intemperate — ask for nothing more than the gradual introduction of a less unintelligent and of a less immoral economic system, but just such reforms as are being introduced to-day in almost every civilized country. In England municipalities are annually increasing the scope of their activities, acquiring their own gas-plants, waterworks, and tramway systems; the same thing is taking place in the United States. In Switzerland the State has just decided to purchase its railroads; in Belgium, Prussia, and Austria the State owns many of them. In New Zealand and Australia State ownership is still more largely recognized. The collectivist, therefore, preaches nothing new, but rather justifies a political movement that has already begun. . . .

It cannot be too often repeated that it is by no means necessary to collectivism, whether regarded as an economic theory or as a political program, that it should be proved to be ever possible or practicable in its ideal or ultimate development. The principal aim of this book is to destroy the doctrine of Herbert Spencer that there are sound, scientific, economic, or political grounds for reducing government to the least possible. The extent to which

collectivism can be wisely resorted to depends upon the economic, political, and moral development of the people. Keeping in view, then, the essentially local character of the political problem presented by collectivism, let us attack the question of collectivism by considering the definition of it given by Schäffle, who has written one book for the purpose of telling us what it is, and another for the purpose of explaining that it is impossible.

WHAT IS COLLECTIVISM?

Schäffle defines collectivism as follows:

"The economic quintessence of the socialistic program, the real aim of the international movement, is as follows:

"To replace the system of private capital (*i.e.* the speculative method of production, regulated on behalf of society only by the free competition of private enterprises) by a system of collective capital; that is, by a method of production which would introduce a unified (social or 'collective') organization of national labor, on the basis of collective or common ownership of the means of production by all the members of the society. This collective method of production would remove the present competitive system by placing under official administration such departments of production as can be managed collectively (socially or coöperatively) as well as the distribution among all of the common produce of all, according to the amount of social utility of the productive labor of each.

"This represents in the shortest possible formula the aim of the socialism of to-day, however variously expressed, and in some cases obscurely conceived, may be the proposed methods for attaining it."[1]

To this account of ideal collectivism the following observations may be made:

In the first place, if I were undertaking to make a

[1] The Quintessence of Socialism, Dr. A. Schäffle, p. 3.

definition of ideal collectivism, I should avoid the use of the word "official" because the official under our present system is and must be a totally different person from the official under the collectivist State, for reasons which will be explained later. To use the word "official," therefore, in connection with the administration of a collectivist State, is to associate with such a State the notion of an intolerable bureaucracy. As this is one of the standing objections to collectivism, it will have to be considered separately later on.

In the second place, and this is by far the most important change that will be proposed to Schäffle's formula, the attempt to distribute "among all the common produce of all, according to the amount of social utility of the productive labor of each," is not a necessary feature of collectivism. On the contrary, in the form of collectivism that seems least impractical, there will be comparatively little attempt made to distribute the income of the community amongst its members in proportion to the amount or utility of the productive labor of each, but rather all will to the utmost possible share equally in the income of the community. Nevertheless, the inevitable natural inequalities amongst men will make it much easier for some to perform their allotted task than others, and therefore, although all will receive the same share of the community income, some will receive it with less labor, and doubtless with less disagreeable labor, than others; and these, as they enjoy a larger leisure than the others, will be at liberty to apply this leisure either to their own pleasure and advantage or to the public good. Moreover, no rigid rules can be laid down on this point. The collectivism of one State is likely to differ from that of other States just as much as popular government in the United States differs from popular government in France. It may be found convenient to confine the system of equal sharing to the barest necessaries of life, or, on the contrary, to apply it

to all its comforts and superfluities; this will depend upon the character of the people and the extent of their development.

Justice, according to many authors, demands that men should be rewarded according to their utility, — in other words, that human institutions should proceed exactly as Nature does; for Nature begins by committing the injustice of favoring one individual at birth more than another; and she adds to this injustice throughout the entire life of her favorite; for the favors granted at birth continue throughout his life so to operate as to sacrifice all others to him. Now, this consequence of natural injustice at birth is exactly what man has attempted to resist; he has already so far succeeded that the man of excelling muscular strength no longer lords it over his fellows, but he has substituted for the tyranny of muscular strength the tyranny of that particular form of craft which is skillful in amassing wealth. One tyranny is as bad, and in some respects worse, than the other. . . .

One of the worst results of our competitive system is that it rewards men according to their *deeds*, giving to the few more than they *need*, and to the many less; stimulating them to effort for the purpose of benefiting self, instead of for the purpose of benefiting the community. The higher order of selfishness, called altruism, has already been realized in the family: a man works for his family because he loves it; altruism has also been realized, but to a less degree, in the city and the State. A man will work for his country — nay, will die for it — because he loves it. The next step in altruism is not so impossible as it seems, if once our institutions make it possible. Relieve a man from the necessity of always working for himself, and he will soon acquire and possibly delight in the taste for working for others.

The form of ideal collectivism then proposed here is one in which every man will receive to the utmost possible

the same share of the national income, and *not* one that gives to men according to their *deeds;* for this last would stimulate selfishness, and selfishness is the great obstacle to human happiness. Those who propose to admit this stimulus into the ideal collectivist State lose the moral point of collectivism, the main purpose of which is to *strike at the root of selfishness.* To expose society to the changes involved in collectivism without removing the stimulus of selfishness would, from the moral point of view, be to attack the symptom and leave undiminished the disease.

The Spencerian doctrine that justice involves the idea of "inequality of benefits" is consistent with the brutal predatory plan of Nature, but inconsistent with the human ideal which seeks to compensate the unfortunate for the unhappiness to which natural defects expose them. These are the conditions condemned by Christ in the words: "Unto every one that hath shall be given, . . . but from him that hath not shall be taken away even that which he hath." . . .

The aim of collectivism is to substitute love of the neighbor for love of self by framing institutions that make this substitution possible. . . .

Those who oppose Collectivism very properly point out that if the social income is to be divided according to *deeds*, the division must be intrusted to the government; and that the power of determining how much of social income is to be enjoyed by the various members of a community is a power far greater in extent and far more liable to abuse than any power enjoyed by any civilized government to-day. If the scramble for office, which must always take place, whatever be the economic scheme of society, is to be intensified by the fact that the heads of the government are not only to enjoy the consideration and authority that pertain to office, but also are to have the power of distributing national income according to

deeds, politics would, under such a system, tend to become a field for the basest intrigue and the most remorseless audacity. Such a collectivism would submit the fortune of every individual to the *ipse dixit* of those who had control of the government. A more arbitrary form of government, or one more likely to result in injustice, cannot well be conceived. It is true that ingenious plans have been devised for determining division according to deeds; but all of them must necessarily give rise to endless discussion and manifold interpretations, and would have ultimately to be left to the decision of some State official, administrative or judicial. Hence would arise the necessity for a large and expensive judicial organization with an elaborate system of courts, juries, lawyers, attorney-generals, and district attorneys; and, indeed, it is probable that the economy resulting from collective production would be more than compensated by the waste of time involved in the determination of how collective income should be divided.

The scheme of Collectivism, therefore, proposed in these pages proceeds upon a simpler plan: it follows nature closely, for it follows the plan of the ant-hill. Every community undertakes to furnish for the individuals which constitute it a certain amount of food, of comforts, of luxuries, of security, and of pleasure. Justice demands that the race be not exhausted or degenerated by the process of obtaining these, and, above all, that the necessity of procuring food be not used by a skillful few as a means for exploiting the many. It is submitted that this demand of justice would be attained were the State to set all the citizens at work according to their best abilities, every citizen working for the benefit of the community during the comparatively few hours that would be required to secure necessaries and ordinary comforts; that all should share in these necessaries and ordinary

comforts equally; and that such a plan would afford a large amount of leisure which every individual could apply to the pursuit of pleasure, whether in the shape of luxury, or art, or literature, or the satisfaction of individual aspirations. . . . Such a plan would secure the greatest economy of production and the greatest personal liberty; and it would eliminate every *economic* occasion of injustice, and, by diminishing base motives of action to a minimum and relieving humanity from the exhaustion which attends competition, advance the race in body, mind, and spirit. . . .

CHAPTER XXI

WOULD SOCIALISM DESTROY ALL PROPERTY [1]

§ 1. The plain fact of the case is that the Socialist, whether he wanted to or no, would no more be able to abolish personal property altogether than he would be able to abolish the human liver. The extension of one's personality to things outside oneself is indeed as natural and instinctive a thing as eating. But because the liver is necessary and inevitable, there is no reason why it should be enlarged to uncomfortable proportions, and because eating is an unconquerable instinct there is no excuse for repletion. The position of the modern Socialist is that the contemporary idea of personal property is enormously exaggerated and improperly extended to things that ought not to be "private"; not that it is not a socially most useful and desirable idea within its legitimate range

There can be no doubt that many of those older writers who were "Socialists before Socialism," Plato, for instance, and Sir Thomas More, did very roundly abolish private property altogether. But the modern Socialist is

[1] [By H(erbert) G(eorge) Wells: born at Bromley, Kent, England, Sept. 21, 1866; B.Sc., Royal College of Science.

His works include: "Select Conversations with an Uncle" (1895); "The Stolen Bacillus" (1895): "The Island of Doctor Moreau" (1896); "The War of the Worlds" (1898): "Tales of Space and Time" (1899); "Anticipations" (1901); "A Modern Utopia" (1905); "New Worlds for Old" (1908); "The New Machiavelli" (1911); "Mr. Britling Sees It Through" (1916); "The Outline of History" (1920); "The Salvaging of Civilization" (1921).

The selection above reprinted is from his "New Worlds for Old" (New York: The Macmillan Co., 1908), pages 137–161 (parts omitted).]

not a Communist; the modern Socialist, making his scheme of social reconstruction for the whole world and for every type of character, recognizes the entire impracticability of such dreams, recognizing too, it may be, the sacrifice of human personality and distinction such ideals involve.

The word "property," one must remember, is a slightly evasive word. Absolute property hardly exists, absolute, that is to say, in the sense of unlimited right of disposal; almost all property is incomplete and relative. A man, under our present laws, has no absolute property even in his own life; he is restrained from suicide and punished if he attempt it. He may not go offensively filthy nor indecently clad; there are limits to his free use of his body. The owner of a house, of land, of a factory, is subject to all sorts of limitations, building regulations, for example, and so is the owner of horse or dog. Nor again is any property exempt from taxation. Even now property is a limited thing, and it is well to bear that much in mind. It can only be defined as something one may do "what one likes with," subject only to this or that specific restriction, and at any time it would seem, the state is at least legally entitled to increase the quantity and modify the nature of the restriction. The extremest private property is limited to a certain sanity and humanity in its use.

In that sense every adult nowadays has private property in his or her own person, in clothes, in such personal implements as hand tools, as a bicycle, as a cricket bat or golf sticks. In quite the same sense would he have it under Socialism so far as these selfsame things go. The sense of property in such things is almost instinctive; my little boys of five and three have the keenest sense of *mine* and (almost, if not quite so vividly) *thine* in the matter of toys and garments. The disposition of modern Socialism is certainly no more to override these natural

tendencies than it is to fly in the face of human nature in regard to the home. The disposition of modern Socialism is indeed far more in the direction of confirming and insuring this natural property. And again, modern Socialism has no designs upon the money in a man's pocket. It is quite true that the earlier and extreme Socialist theorists did in their communism find no use for money, but I do not think there are any representative Socialists now who do not agree that the state must pay and receive in money, that money is indispensable to human freedom. The featurelessness of money, its universal convertibility, gives human beings a latitude of choice and self-expression in its spending that is inconceivable without its use.

All such property Socialism will ungrudgingly sustain, and it will equally sustain property in books and objects of æsthetic satisfaction, in furnishing, in the apartments or dwelling-house a man or woman occupies and in their household implements. It will sustain far more property than the average working-class man has to-day. Nor will it prevent savings or accumulations, if men do not choose to expend their earnings. Nor need it interfere with lending. How far it will permit or countenance usury is another question altogether. There will no doubt remain, after all the workaday needs of the world have been met by a scientific public organization of the general property in Nature, a great number of businesses and enterprises and new and doubtful experiments outside the range of legitimate state activity. In these, interested and prosperous people will embark their surplus money as shareholders in a limited liability company, making partnership profits or losses in an entirely proper manner. But whether there should be debentures and mortgages or preference shares or such like manipulatory distinctions, or interest in any shape or form, I am inclined to doubt. A money-lender should share risk as well as profit — that

is surely the moral law in lending that forbids usury; he should not be allowed to bleed a failing business with his inexorable percentage and so eat up the ordinary shareholder or partner any more than the landlord should be allowed to eat up the failing tenant for rent. . . .

Posthumous property, that is to say, the power to bequeath and the right to inherit things will also persist in a mitigated state under Socialism. There is no reason whatever why it should not do so. There is a strong natural sentiment in favor of the institution of heirlooms, for example; one feels a son might well own — though he should certainly not sell — the intimate things his father desires to leave him. The pride of descent is an honorable one, the love for one's blood, and I hope that a thousand years from now some descendant will still treasure an obsolete weapon here, a picture there, or a piece of faint and faded needlework, from our days and the days before our own. One may hate inherited privileges and still respect a family tree. . . .

All that property which is an enlargement of personality, the modern Socialist seeks to preserve; it is that exaggerated property that gives power over the food and needs of one's fellow-creatures, property and inheritance in land, in industrial machinery, in the homes of others, and in the usurer's grip upon others, that he seeks to destroy. The most doctrinaire Socialists will tell you they do not object to property for use and consumption but only to property in "the means of production," but I do not choose to resort to overprecise definitions. The general intention is clear enough, the particular instance requires particular application. . . . But it is just because we modern Socialists want every one to have play for choice and individual expression in all those realities of property that we object to this monstrous property of a comparatively small body of individuals expropriating the world.

§ 2. I am inclined to think — but here I speak beyond the text of contemporary Socialist literature — that in certain directions Socialism, while destroying property, will introduce a compensatory element by creating rights. For example, Socialism will certainly destroy all private property in land and in natural material and accumulated industrial resources; it will be the universal landlord and the universal capitalist, but that does not mean that we shall all be the State's Tenants-at-will. There can be little doubt that the Socialist state will recognize the rights of the improving occupier and the beneficial hirer. . . .

In another correlated direction, too, Socialism is quite reconcilable with a finer quality of property than our landowner-ridden Britain allows to any but the smallest minority. I mean property in the house one occupies. . . . If I may indulge in a quite unauthorized speculation, I am inclined to think there may be two collateral methods of home-building in the future. For many people always there will need to be houses to which they may come and go for longer and shorter tenancies and which they will in no manner own. But in addition there will be the prosperous private person with a taste that way, building himself a home as a leaseholder under the public landlord. For him, too, there will be a considerable measure of property, a measure of property that might even extend to a right, if not of bequest, then at any rate of indicating a preference among his possible successors in the occupying tenancy. . . .

Then there is a whole field of proprietary sensations in relation to official duties and responsibility. Men who have done good work in any field are not to be lightly torn from it. A medical officer of health who has done well in his district, a teacher who has taught a generation of a town, a man who has made a public garden, have a moral lien upon their work for all their lives. They do

not get it under our present conditions. I know that it will be quite easy to say all this is a question of administration and detail. It is. But it is ,nevertheless, important to state it clearly here, to make it evident that the coming of Socialism involves no destruction of this sort of identification of a man with the thing he does; this identification that is so natural and desirable — that this living and legitimate sense of property will if anything be encouraged and its claims strengthened under Socialism. To-day that particularly living sort of property-sense is often altogether disregarded. Every day one hears of men who have worked up departments in businesses, men who have created values for employers, men who have put their lives into an industrial machine, being flung aside because their usefulness is over, or out of personal pique, or to make way for favorites, for the employer's son or cousin or what not, without any sort of appeal or compensation. Ownership is autocracy, at the best it is latent injustice in all such matters of employment.

§ 3. . . . Then again, consider the case of the artist and the inventor who are too often forced by poverty now to sell their early inventions for the barest immediate subsistence. Speculators secure these initial efforts — sometimes to find them worthless, sometimes to discover in them the sources of enormous wealth. Consider the immense social benefit if the creator even now possessed an inalienable right to share in the appreciation of his work. Under Socialism it would for all his life be his — and the world's, and controllable by him. He would be free to add, to modify, to repeat.

In all these respects modern Socialism tends to create and confirm property and rights, the property of the user, the rights of the creator. It is quite other property it tends to destroy, — the property, the claim, of the creditor, the mortgager, the landlord, and usurer, the forestaller, gambling speculator, monopolizer, and absentee.

. . . In very truth Socialism would destroy no property at all, but only that sham property that, like some wizard-cast illusion, robs us all. . . .

§ 4. While we are discussing the true attitude of modern Socialism to property, it will be well to explain quite clearly the secular change of opinion that is going on in the Socialist ranks in regard to the process of expropriation. Even in the case of those sorts of property that Socialism repudiates, property in land, natural productions, inherited business capital, and the like, Socialism has become humanized and rational from its first extreme and harsh positions.

The earlier Socialism was fierce and unjust to owners. "Property is Robbery," said Proudhon, and right down to the nineties Socialism kept too much of the spirit of that proposition. The property-owner was to be promptly and entirely deprived of his goods and to think himself lucky he was not lynched forthwith as an abominable rascal. The first Basis of the Fabian Society framed so lately as 1884 repudiates "compensation" — even a partial compensation of property-owners — though in its practical proposals the Fabian Society has always been saner than its creed.

Now property is *not* robbery. It may be a mistake, it may be unjust and socially disadvantageous to recognize private property in these great common interests; but every one concerned, and the majority of the property-owners certainly, held and hold in good faith, and do their best by the light they have. We live to-day in a vast tradition of relationships in which the rightfulness of that kind of private property is assumed, and suddenly, instantly, to deny and abolish it would be — I write this as a convinced and thorough Socialist — quite the most dreadful catastrophe human society could experience. For what sort of provisional government should we have in that confusion?

Expropriation must be a gradual process, a process of economic and political readjustment, accompanied at every step by an explanatory educational advance. There is no reason why a cultivated property-owner should not welcome and hasten its coming. Modern Socialism is prepared to compensate him, not perhaps "fully" but reasonably, for his renunciations and to avail itself of his help, to relieve him of his administrative duties, his excess of responsibility for estate and business. It does not grudge him a compensating annuity nor terminating rights of user. It has no intention of obliterating him nor the things he cares for. It wants not only to socialize his possessions, but to socialize his achievement in culture and all that leisure has taught him of the possibilities of life. It wants all men to become as fine as he. Its enemy is not the rich man but the aggressive rich man, the usurer, the sweater, the giant plunderer, who are developing the latent evil of riches. It repudiates altogether the conception of a bitter class-war between those who Have and those who Have Not.

But this new tolerant spirit in method involves no weakening of the ultimate conception. Modern Socialism sets itself absolutely against the creation of new private property out of land, or rights or concessions not yet assigned. All new great monopolistic enterprises in transit, building, and cultivation, for example, must from the first be under public ownership. And the chief work of social statesmanship, the secular process of government, must be the steady, orderly resumption by the community, without violence and without delay, of the land, of the apparatus of transit, of communication, of food distribution, and of all the great common services of mankind, and the care and training of a new generation in their collective use and in more civilized conceptions of living.

CHAPTER XXII

A VESTED INTEREST IS THE PRESCRIPTIVE RIGHT TO GET SOMETHING FOR NOTHING [1]

THE INDUSTRIAL REVOLUTION

THE modern point of view, with its constituent principles of equal opportunity, self-help, and free bargaining, was given its definitive formulation in the eighteenth century, as a balanced system of Natural Rights; and it has stood over intact since that time, and has served as the unquestioned and immutable ground of public morals and expediency, on which the advocates of enlightened and liberal policies have always been content to rest in their case. This eighteenth-century order of nature, in the magic name of which Adam Smith was in the habit of speaking, was conceived on lines of personal initiative and activity. It is an order of things in which men were conceived to be effectually equal in all those respects that are of any decided consequence, — in intelligence, working capacity, initiative, opportunity, and personal worth; in

[1][By THORSTEIN B. VEBLEN: A.B. (1880) Carleton College; Ph.D. (1884) Yale University; assistant professor (1900–06), University of Chicago; associate professor of economics (1906–09), Leland Stanford Jr. University; teacher, New School for Social Research (N. Y.), 1917– .

His works include: "The Theory of the Leisure Class" (1899); "The Theory of Business Enterprise" (1904); "The Instinct of Workmanship" (1914); "Imperial Germany and the Industrial Revolution" (1915); "An Inquiry into the Nature of Peace and the Terms of Its Perpetuation" (1917); "The Higher Learning in America" (1918); "The Vested Interests" (1919).

The selection above reprinted is from his "The Vested Interests" (New York: Huebsch & Co., 1919), being pages 35–62, 155–157 (parts omitted).]

which the creative factor engaged in industry was the workman, with his personal skill, dexterity and judgment; in which, it was believed, the employer ("master") served his own ends and sought his own gain by consistently serving the needs of creative labor, and thereby serving the common good; in which the traders ("middle-men") made an honest living by supplying goods to consumers at a price determined by labor cost, and so serving the common good. . . .

For a hundred years and more it has continued to stand as a familiar article of faith and aspiration among the advocates of a Liberal policy in civil and economic affairs. . . .

However, a new order of things has been taking effect in the state of the industrial arts and in the material sciences that lie nearest to that tangible body of experience out of which the state of the industrial arts is framed. And the new order of industrial ways and means has been progressively going out of touch with the essential requirements of this established scheme of individual self-help and personal initiative, on the realization and maintenance of which the best endeavors of the Liberals have habitually been spent.

Under the new order the first requisite of ordinary productive industry is no longer the workman and his manual skill, but rather the mechanical equipment and the standardized processes in which the mechanical equipment is engaged. And this latterday industrial equipment and process embodies not the manual skill, dexterity and judgment of an individual workman, but rather the accumulated technological wisdom of the community. Under the new order of things the mechanical equipment — the "industrial plant" — takes the initiative, sets the pace, and turns the workman to account in the carrying-on of those standardized processes of production that embody this mechanistic state of the industrial arts. . . .

Under the new order the going concern in production is the plant or shop, the works, not the individual workman. The plant embodies a standardized industrial process. The workman is made use of according as the needs of the given mechanical process may require. The workman has become subsidiary to the mechanical equipment, and productive industry has become subservient to business, in all those countries which have come in for the latterday state of the industrial arts, and which so have fallen under the domination of the price system. . . .

The typical owner-employer of the earlier modern time, such as he stood in the mind's eye of the eighteenth-century doctrinaires, — this traditional owner-employer has also come through the period of the mutation in a scarcely better state of preservation. . . .

The personal employer-owner has virtually disappeared from the great industries. His place is now filled by a list of corporation securities and a staff of corporation officials and employees who exercise a limited discretion. The personal note is no longer to be had in the wage relation, except in those backward, obscure and subsidiary industries in which the mechanical reorganization of the new order has not taken effect. So, even that contractual arrangement which defines the workman's relation to the establishment in which he is employed, and to the anonymous corporate ownership by which he is employed, now takes the shape of a statistical reckoning, in which virtually no trace of the relation of man to man is to be found. Yet the principles of the modern point of view governing this contractual relation, in current law and custom, are drawn on the assumption that wages and conditions of work are arranged for by free bargaining between man and man on a footing of personal understanding and equal opportunity. . . .

The personal equation is no longer a material factor in the situation. Ownership, too, has been caught in the

net of the New Order and has been depersonalized to a degree beyond what would have been conceivable a hundred years ago, especially so far as it has to do with the use of material resources and man power in the greater industries. Ownership has been "denatured" by the course of events; so that it no longer carries its earlier duties and responsibilities. It used to be true that personally responsible discretion in all details was the chief and abiding power conferred by ownership; but wherever it has to do with the machine industry and large-scale organization, ownership now has virtually lost this essential part of its ordinary functions. It has taken the shape of an absentee ownership of anonymous corporate capital, and in the ordinary management of this corporate capital the greater proportion of the owners have no voice. . . .

Corporate capital of this kind is impersonal in more than one sense: it may be transferred piecemeal from one owner to another without visibly affecting the management or the rating of the concern whose securities change hands in this way; and the personal identity of the owner of any given block of this capital need not be known even to the concern itself, to its administrative officers, or to those persons whose daily work and needs are bound up with the daily transactions of the concern. For most purposes and as regards the greater proportion of the investors who in this way own the corporation's capital, these owners are, in effect, anonymous creditors, whose sole effectual relation to the enterprise is that of a fixed "overhead charge" on its operations. Such is the case even in point of form as regards the investors in corporate bonds and preferred stock. The ordinary investor is, in effect, an *anonymous pensioner on the enterprise;* his relation to industry is in the nature of a liability, and his share in the conduct of this industry is much like the share which the Old Man of the Sea once had in the promenades of Sinbad. . . .

The common man is beginning to see these things in the glaring though fitful light of that mechanistic conception that rates men and things on grounds of tangible performance, — without much afterthought. As seen in this light, and without much afterthought, very much of the established system of obligations, earnings, perquisites and emoluments, appears to rest on a network of make-believe.

Now, it may be deplorable, perhaps inexcusable, that the New Order in industry should engender habits of thought of this unprofitable kind; but then, after all, regrets and excuses do not make the outcome, and with sufficient reason attention to-day centers on the outcome.

To the common man who has taken to reckoning in terms of tangible performance, in terms of man power and material resources, these returns on investment that rest on productive enterprise as an overhead charge are beginning to look like unearned income. . . .

Productive industry yields a margin of net product over cost, counting cost in terms of man power and material resources; and under the established rule of self-help and free bargaining as it works out in corporation finance, this margin of net product has come to rest upon productive industry as an overhead charge payable to anonymous outsiders who own the corporation securities.

There need be no question of the equity of this arrangement, as between the men at work in the industries and the beneficiaries to whom the overhead charge is payable. At least there is no intention here to question the equity of it, or to defend the arrangement against any question that may be brought. It is also to be remarked that the whole arrangement has this appearance of gratuitous handicap and hardship only when it is looked at from the crude ground level of tangible performance. When seen in the dry light of the old and honest principles of

self-help and equal opportunity, as understood by the substantial and well-meaning citizens, it all casts no shadow of iniquity or inexpediency. . . .

Evidently the total output of product turned out under this industrial system, the "annual production," to use Adam Smith's phrase, or the "annual dividend," to use a phrase taken from later usage, — this total is the output of the total community working together as a balanced organization of industrial forces engaged in a moving equilibrium of production.

Evidently, too, the amount of the annual production depends on the state of the industrial arts which the working population has the use of for the time being; which is in the main a matter of technological knowledge and popular education. The net product is the amount by which this actual production exceeds its own cost, as counted in terms of subsistence, and including the cost of the necessary mechanical equipment; this net product will then approximately coincide with the annual keep, the cost of maintenance and replacement, of the investors or owners of capitalized property who are not engaged in productive industry; and who are on this account sometimes spoken of as the "kept classes." Indeed, it would seem that the number and average cost per capita of the kept classes, *communibus annis*, affords something of a rough measure of the net product habitually derived from the community's annual production. . . .

The Industrial Revolution of the eighteenth century was a revolution in the state of the industrial arts, of course; it was a mutation of character in the common stock of technological knowledge held and used by the industrial population of the civilized countries from that time forward. . . .

This body of technological knowledge, the state of the industrial arts, of course has always continued to be held as a joint stock. Indeed this joint stock of technology is

the substance of the community's civilization on the industrial side, and therefore it constitutes the substantial core of that civilization. Like any other phase or element of the cultural heritage, it is a joint possession of the community, so far as concerns its custody, exercise, increase and transmission. But it has turned out, under the peculiar circumstances that condition the use of this technology among these civilized peoples, that its ownership or usufruct has come to be effectually vested in a relatively small number of persons. . . .

As an intellectual achievement and as a working force the state of the industrial arts continues, of course, to be held jointly in and by the community at large; but equitable title to its usufruct has, in effect, passed to the owners of the indispensable material means of industry. . . .

To many persons, perhaps to the greater proportion of those unpropertied persons that are often spoken of collectively as "the common man," the state of things which has just been outlined may seem untoward. But it is beginning to appear now, after the event, that the inclusion of unrestricted ownership among those rights and perquisites which were allowed to stand over when the transition was made to the modern point of view is likely to prove inexpedient in the further course of growth and change. . . .

VESTED INTERESTS

Industry is a matter of tangible performance in the way of producing goods and services. In this connection it is well to recall that a vested interest is a prescriptive right to get something for nothing. Now, any project of reconstruction, the scope and method of which are governed by considerations of tangible performance, is likely to allow only a subsidiary consideration or something less to the legitimate claims of the vested interests, whether

they are vested interests of business or of privilege. It is more than probable that in such a case national pretensions in the way of preferential concessions in commerce and investment will be allowed to fall into neglect, so far as to lose all value to any vested interest whose fortunes they touch. These things have no effect in the way of net tangible performance. They only afford ground for preferential pecuniary rights, always at the cost of someone else; but they are of the essence of things in that pecuniary order within which the vested interests of business live and move. So also such a matter-of-fact project of reconstruction will be likely materially to revise outstanding credit obligations, including corporation securities, or perhaps even bluntly to disallow claims of this character to free income on the part of beneficiaries who can show no claim on grounds of current tangible performance. All of which is inimical to the best good of the vested interests and the kept classes.

Reconstruction which partakes of this character in any sensible degree will necessarily be viewed with the liveliest apprehension by the gentlemanly statesmen of the old school, by the kept classes, and by the captains of finance. It will be deplored as a subversion of the economic order, a destruction of the country's wealth, a disorganization of industry, and a sure way to poverty, bloodshed, and pestilence. In point of fact, of course, what such a project may be counted on to subvert is that dominion of ownership by which the vested interests control and retard the rate and volume of production. The destruction of wealth in such a case will touch, directly, only the value of the securities, not the material objects to which these securities have given title of ownership; it would be a disallowance of ownership, not a destruction of useful goods. Nor need any disorganization or disability of productive industry follow from such a move; indeed, the apprehended cancelment of the claims to

income covered by negotiable securities would by that much cancel the fixed overhead charges resting on industrial enterprise, and so further production by that much. But for those persons and classes whose keep is drawn from prescriptive rights of ownership or of privilege the consequences of such a shifting of ground from vested interest to tangible performance would doubtless be deplorable. In short, "Bolshevism is a menace"; and the wayfaring man out of Armenia will be likely to ask: A menace to whom?

CHAPTER XXIII

A CRITIQUE OF THE HENRY GEORGE THEORY OF PRIVATE PROPERTY IN LAND [1]

If land were not privately owned there would be no receiving of rent by individuals. Therefore, the morality of the landlord's share of the national product is intimately related to, and is usually treated in connection with the morality of private ownership.

Substantially all the opponents of private property in land to-day are either Socialists or disciples of Henry George. In the view of the former, land as well as the other means of production should be owned and managed by the State. Although they are more numerous than the Georgeites, their attack upon private landownership is less conspicuous and less formidable than the propaganda carried on by the Henry George men. The Socialists give most of their attention to the artificial instruments of production, dealing with land only incidentally, implicitly, or occasionally. The followers of Henry George, commonly known as Single Taxers or Single Tax men, defend the private ownership of artificial capital, or capital in the strict economic sense, but desire that the control of the community over the natural means of production should

[1] [By John A. Ryan: born in Dakota County, Minn., May 25, 1869; ordained Roman Catholic priest, 1898; D.D. (1906) Catholic University, Washington, D. C.; since 1915, professor moral theology and industrial Ethics, Catholic University.

His works include: "A Living Wage" (1906); "Francisco Ferrer" (1910); "Alleged Socialism of the Church Fathers" (1913); "Distributive Justice" (1916); "The Church and Socialism" (1916).

The selection above reprinted is from his "Distributive Justice" (The Macmillan Co., N. Y., 1916), pages 19-47 (parts omitted).]

be so far extended as to appropriate for public uses all economic rent. Their criticism of private ownership is not only more prominent than that made by the Socialists, but is based to a much greater extent upon ethical considerations.

ARGUMENTS BY SOCIALISTS

Indeed, the orthodox or Marxian Socialists are logically debarred by their social philosophy from passing a strictly moral judgment upon property in land. For their theory of economic determinism, or historical materialism, involves the belief that private landownership, like all other social institutions, is a *necessary product* of economic forces and processes. Hence it is neither morally good nor morally bad. Since neither its existence nor its continuance depends upon the human will, it is entirely devoid of moral quality. It is as unmoral as the succession of the seasons, or the movement of the tides. And it will disappear through the inevitable processes of economic evolution. . . .

Frequently, however, the individual Socialist forgets this materialistic theory, and falls back upon his common sense, and his innate conceptions of right and wrong, of free will and responsibility. Instead of regarding the existing land system as a mere product of blind economic forces, he often denounces it as morally wrong and unjust. His contentions may be reduced to two propositions: (1) The proprietor who takes rent from a cultivator robs the producer of a part of his product; and no one has a right to take for his exclusive use that which is the natural heritage and means of support for all the people. Referring to the receipt of 35,000,000 pounds a year in rent by 8000 British landlords, Hyndman and Morris exclaim: "Yet in the face of all this a certain school still contend that there is no class robbery." [1] Since the claim that the

[1] "A Summary of the Principles of Socialism," p. 23; London, 1899.

laborer has a right to the full product of his labor applies to capital as well as to land, it can be more conveniently considered when we come to treat of the income of the capitalist. (2) With regard to the second contention, the following statement by Robert Blatchford may be taken as fairly representative of Socialist thought: "The earth belongs to the people. . . . So that he who possesses land possesses that to which he has no right, and he who invests his savings in land becomes the purchaser of stolen property." [1] Inasmuch as this argument is substantially the same as one of the fundamental contentions in the system of Henry George, it will be discussed in connection with the latter, in the pages immediately following.

HENRY GEORGE'S ATTACK ON THE TITLE OF FIRST OCCUPANCY

Every concrete right, whether to land or to artificial goods, is based upon some contingent fact or ground, called a title. By reason of some title a man is justified in appropriating a particular farm, house, or hat. When he becomes the proprietor of a thing that has hitherto been ownerless, his title is said to be original; when he acquires an article from some previous owner, his title is said to be derived. As an endless series of proprietors is impossible, every derived title must be traceable ultimately to some original title. Among the derived titles the most important are contract, inheritance, and prescription. The original title is either first occupancy or labor. The prevailing view among the defenders of private landownership has always been that the original title is not *labor* but *first occupancy*. If this title be not valid every derived title is worthless, and no man has a true right to the land that he calls his own. Henry George's attack upon the title of first occupancy is an important link in his argument against private property in land.

[1] "Socialism: A Reply to the Pope's Encyclical," p. 4; London, 1899.

"Priority of occupation gives exclusive and perpetual title to the surface of a globe in which, in the order of nature, countless generations succeed each other! . . . Has the first comer at a banquet the right to turn back all the chairs, and claim that none of the other guests shall partake of the food provided, except as they make terms with him? Does the first man who presents a ticket at the door of a theater, and passes in, acquire by his priority the right to shut the doors and have the performance go on for him alone? . . . And to this manifest absurdity does the recognition of the individual right to land come when carried to its ultimate that any human being, could he concentrate in himself the individual rights to the land of any country, could expel therefrom all the rest of the inhabitants; and could he concentrate the individual rights to the whole surface of the globe, he alone of all the teeming population of the earth would have the right to live." [1]

In passing, it may be observed that Henry George was not the first distinguished writer to use the illustration drawn from the theater. Cicero, St. Basil, and St. Thomas Aquinas all employed it to refute extravagant conceptions of private ownership. In reply to the foregoing argument of Henry George, we point out: first, that the right of ownership created by first occupancy is not unlimited, either extensively or intensively; and, second, that the historical injustices connected with private ownership have been in only a comparatively slight degree due to the first occupation of very large tracts of land.

The right of first occupancy does not involve the right to take a whole region or continent, compelling all subsequent arrivals to become tenants of the first. There seems to be no good reason to think that the first occupant is justified in claiming as his own more land than he can cultivate by his own labor, or with the assistance of those

[1] "Progress and Poverty," book VII, ch. I.

who prefer to be his employees or his tenants rather than independent proprietors. "He has not the right to reserve for himself alone the whole territory, but only that part of it which is really useful to him, which he can make fruitful." [1] Nor is the right of private landownership, on whatever title it may rest, unlimited intensively, that is, in its powers or comprehension. Though a man should have become the rightful owner of all the land in a neighborhood, he would have no moral right to exclude therefrom those persons who could not without extreme inconvenience find a living elsewhere. He would be morally bound to let them cultivate it at a fair rental. The Christian conception of the intensive limitations of private ownership is well exemplified in the action of Pope Clement IV, who permitted strangers to occupy the third part of any estate which the proprietor refused to cultivate himself. [2] Ownership understood as the right to do what one pleases with one's possessions, is due partly to the Roman law, partly to the Code Napoléon, but chiefly to modern theories of individualism.

In the second place, the abuses which have accompanied private property in land are very rarely traceable to abuses of the right of first occupancy. The men who have possessed too much land, and the men who have used their land as an instrument of social oppression, have scarcely ever been first occupants or the successors thereof through derived titles. This is especially true of modern abuses, and modern legal titles. In the words of Herbert Spencer: "Violence, fraud, the prerogative of force, the claims of superior cunning, — these are the sources to which these titles may be traced. The original deeds were written with the sword, rather than with the pen: not lawyers but soldiers were the conveyancers: blows were the current coin given in payment; and for seals blood was

[1] "La Propriété Privée," par L. Garriguet, I, 62; Paris, 1903.
[2] *Cf.* Ardant, "Papes et Paysans," pp. 41 sq.

used in preference to wax." [1] Not the appropriation of land which nobody owned, but the forcible and fraudulent seizure of land which had already been occupied, has been one of the main causes of the evils attending upon private landownership. Moreover, in England and all other countries that have adopted her legal system, the title of first occupancy could never be utilized by individuals: all unoccupied land was claimed by the Crown or by the State, and transferred thence to private persons or corporations. If some individuals have got possession of too much land through this process, the State, not the title of first occupancy, must bear the blame. This is quite clear in the history of land tenure in the United States and Australasia.

Henry George's attack upon private landownership through the title of first occupancy is therefore ineffective; for he attributes to this qualities that it does not possess, and consequences for which it is not responsible.

HIS DEFENSE OF THE TITLE OF LABOR

Thinking that he has shattered the title of first occupancy, Henry George undertakes to set up in its place the title of labor. "There can be to the ownership of anything no rightful title which is not derived from the title of the producer, and does not rest on the natural right of the man to himself." [2] The only original title is man's right to the exercise of his own faculties; from this right follows his right to what he produces; now man does not produce land; therefore he cannot have rightful property in land. Of these four propositions the first is a pure assumption, the second is untrue, the third is a truism, and the fourth is as unfounded as the first. Dependently upon God, man has, indeed, a right to himself and to the

[1] "Social Statics," chap. IX; 1850. Spencer's retractation, in a later edition of this work, of his earlier views on the right of property in land does not affect the truth of the description quoted in the passage above.

[2] "Progress and Poverty," *loc. cit.*

exercise of his own faculties; but this is a right of action, not of property. By the exercise of this right alone man can never produce anything, never become the owner of anything. He can produce only by exerting his powers upon something outside of himself; that is, upon the goods of external nature. To become the producer and the owner of a product, he must first become the owner of materials. By what title is he to acquire these? In one passage [1] Henry George seems to think that no title is necessary, and refers to the raw material as an "accident," while the finished product is the "essence," declaring that "the right of private ownership attaches the accident to the essence, and gives the right of ownership to the natural material in which the labor of production is embodied." Now this solution of the difficulty is too simple and arbitrary. Its author would have shrunk from applying it universally; for example, to the case of the shoemaker who produces a pair of shoes out of stolen materials, or the burglar who makes an overcoat more useful (and therefore performs a task of production) by transferring it from a warehouse to his shivering back! Evidently Henry George has in mind only raw material in the strict sense, that which has not yet been separated from the storehouse of nature; for he declares in another place that "the right to the produce of labor cannot be enjoyed without the free use of the opportunities offered by nature." [2] In other words, man's title to the materials upon which he is to exercise his faculties, and of which he is to become the owner by right of production, is the title of gift conferred by nature, or nature's God.

Nevertheless this title is applicable only to those goods that exist in unlimited abundance, not to those parts of the natural bounty that are scarce and possess economic value. A general assumption by producers that they were

[1] "Open Letter to Pope Leo XIII," page 25 of Vierth's edition.
[2] "Progress and Poverty," *loc. cit.*

entitled to take possession of the gifts of nature indiscriminately would mean industrial anarchy and civil war. Hence Henry George tells us that the individual should pay rent to "the community to satisfy the equal rights of all other members of the community." [1] But inasmuch as the individual must pay this price before he begins to produce, his right to the use of natural opportunities is not "free," nor does his labor alone constitute a title to that part of them that he utilizes in production. Consequently labor does not create a right to the concrete product. It merely gives the producer a right to the value that he adds to the raw material. His right to the raw material itself, to the elements that he withdraws from the common store, and fashions into a product, say, wheat, lumber, or steel, does not originate in the title of labor but in the title of contract. This is the contract by which in exchange for rent paid to the community he is authorized to utilize these materials. Until he has made this contract he has manifestly no full right to the product into which natural forces as well as his own labor have entered. According to Henry George's own statements, therefore, the right to the product does not spring from labor alone, but from labor plus compensation to the community. Since the contract by which the prospective user agrees to pay this compensation or rent must precede his application of labor, it instead of labor is the original title. Since the contract is made with a particular community for the use of a particular piece of land, the title that it conveys must derive ultimately from the occupation of that land by that community, — or some previous community of which the present one is the legal heir. So far as economically valuable materials are concerned, therefore, the logic of Henry George's principles leads inevitably to the conclusion that the original title of ownership is first occupancy.

[1] "Progress and Poverty," *loc. cit.*

Even in the case of economically free goods, the original title of ownership is occupancy. Henry George declares that the traveler who has filled his vessels at a free-for-all spring owns the water when he has carried it into a desert, by the title of labor.[1] Nevertheless, in its original place this water belonged either to the community or to nobody. In the former supposition it can become the property of the traveler only through an explicit or implicit gift from the community; and it is this contract, not labor, that constitutes his title to the water. If we assume that the spring was ownerless, we see that the labor of carrying a portion of it into the desert still lacks the qualifications of a title; for the abstracted water must have belonged to him before he began the journey. It must have been his from the moment that he separated it from the spring. Otherwise he had no right to take it away. His labor of transporting it gave him a right to the utility thus added to the water, but not a right to the water when it first found a local habitation in his vessels. Nor was the labor of transferring it from the spring into his vessels the true title; for labor alone cannot create a right to the material upon which it is exerted, as we see in the case of stolen objects. If it be contended that labor together with the natural right to use the ownerless goods of nature have all the elements of a valid title, the assertion must be rejected as unprecise and inadequate. The right to use ownerless goods is a general and abstract right that requires to become specific and concrete through some title. In the case of water it is a right to water in general, to some water, but not a right to a definite portion of the water in this particular spring. The required and sufficient title here is that of apprehension, occupation, the act of separating a portion from the natural reservoir. Therefore, it is first occupancy as exemplified in mere seizure of an ownerless good, not labor in the sense of productive activity,

[1] "Open Letter to Pope Leo XIII," *loc. cit.*

nor labor in the sense of painful exertion, that constitutes the precise title whereby the man acquires a right to the water that he has put into his cup or barrel. Mere seizure is a sufficient title in all such cases as that which we are now considering, simply because it is a reasonable method of determining and specifying ownership. There is no need whatever of having recourse to the concept of labor to justify this kind of property right. In the present case, indeed, the acts of apprehension and of productive labor (the labor of dipping the water into a vessel *is* productive inasmuch as the water is more useful there than in the spring) are the same physically, but they are distinct logically and ethically. One is mere occupation, while the other is production; and ownership of a thing must precede, in morals if not in time, the expenditure upon it of productive labor. . . .

To sum up the entire discussion on the original title of ownership: Henry George's attack upon first occupancy is futile because based upon an exaggerated conception of the scope of private landownership, and upon a false assumption concerning the responsibility of that title for the historical evils of the system. His attempt to substitute labor as the original title is likewise unsuccessful, since labor can give a right only to the utility added to natural materials, not to the materials themselves. Ownership of the latter reaches back finally to occupation. Whence it follows that the title to an artificial thing, such as a hat or coat, water taken from a spring, a fish drawn from the sea, is a joint or twofold title; namely, occupation and labor. Where the product embodies scarce and economically valuable raw material, occupation is usually prior to labor in time; in *all* cases it is prior to labor logically and ethically. Since labor is not the original title, its absence in the case of land does not leave that form of property unjustified. The title of first occupancy remains. In a word, the one

original title of all property, natural and artificial, is first occupancy.

The other arguments of Henry George against private landownership are based upon the assumed right of all mankind to land and land values, and on the contention that this right is violated by the present system of tenure.

THE RIGHT OF ALL MEN TO THE BOUNTY OF THE EARTH

"The equal right of all men to the use of land is as clear as their equal right to breathe the air — it is a right proclaimed by the fact of their existence. For we cannot suppose that some men have a right to be in the world, and others no right.

"If we are here by the equal permission of the Creator, we are all here with an equal title to the enjoyment of his bounty — with an equal right to the use of all that nature so impartially offers. . . . There is in nature no such thing as a fee simple in land. There is on earth no power which can rightfully make a grant of exclusive ownership of land. If all existing men were to grant away their equal rights, they could not grant away the rights of those who follow them. For what are we but tenants for a day? Have we made the earth that we should determine the rights of those who after us shall tenant it in their turn?" [1]

[1.] The right to use the goods of nature for the support of life is certainly a fundamental natural right; and it is substantially equal in all persons. It arises, on the one hand, from man's intrinsic worth, his essential needs, and his final destiny; and, on the other hand, from the fact that nature's bounty has been placed by God at the disposal of all His children indiscriminately. But this is a general and abstract right. What does it imply specifically and in the concrete? In the first place, it includes the actual and continuous use of some land; for a man cannot support life unless he is permitted to occupy some

[1] "Progress and Poverty," book VII, ch. I.

portion of the earth for the purposes of working, and eating, and sleeping. Secondly, it means that in time of extreme need, and when more orderly methods are not available, a man has the right to seize sufficient goods, natural or produced, public or private, to support life. So much is admitted and taught by all Catholic authorities, and probably by all other authorities. Furthermore, the abstract right in question seems very clearly to include the concrete right to obtain on reasonable conditions at least the requisites of a decent livelihood; for example, by direct access to a piece of land, or in return for a reasonable amount of useful labor. All of these particular rights are equally valid in all persons.

Does the equal right to use the bounty of nature include the right to equal *shares* of land, or land values, or land advantages? The correct principle of distribution would seem to be absolute equality, except in so far as it may be modified on account of varying *needs*, and varying *capacities* for social service. In any just distribution account must be taken of differences in needs and capacities; for it is not just to treat men as equal in those respects in which they are unequal, nor is it fair to deprive the community of those social benefits which can be obtained only by giving exceptional rewards for exceptional services.

[2.] Now it is true that private ownership of land has nowhere realized this principle of proportional equality and proportional justice. No such result is possible in a system that, in addition to other difficulties, would be required to make a new distribution at every birth and at every death. Private ownership of land can never bring about ideal justice in distribution. Nevertheless it is not necessarily out of harmony with the demands of *practical* justice. A community that lacks either the knowledge or the power to establish the ideal system is not guilty of actual injustice because of this failure. In

such a situation the proportionally equal rights of all men to the bounty of nature are not actual rights. They are conditional, or hypothetical, or suspended. At best they have no more moral validity than the right of a creditor to a loan that, owing to the untimely death of the debtor, he can never recover. In both cases it is misleading to talk of injustice; for this term always implies that some person or community is guilty of some action which could have been avoided. The system of private land-ownership is not, indeed, perfect; but this is not exceptional in a world where the ideal is never attained, and all things are imperfect. Henry George declares that "there is on earth no power which can rightfully make a grant of exclusive ownership in land;" but what would he have a community do which has never heard of his system? Introduce some crude form of communism, or refrain from using the land at all, and permit the people to starve to death in the interests of ideal justice? Evidently such a community must make grants of exclusive ownership, and these will be as valid in reason and in morals as any other act that is subject to human limitations which are at the time irremovable.

[3.] Perhaps the Single Taxer would admit the force of the foregoing argument. He might insist that the titles given by the State in such conditions were not exclusive grants in the strict sense, but were valid only until a better system could be set up, and the people put in possession of their natural heritage. Let us suppose, then, that a nation were shown "a more excellent way." Suppose that the people of the United States set about to establish Henry George's system in the way that he himself advocated. They would forthwith impose upon all land an annual tax equivalent to the annual rent. What would be the effect upon private land-incomes, and private land-wealth? Since the first would be handed over to the State in the form of a tax, the second would utterly

disappear. For the value of land, like the value of any other economic good, depends upon the utilities that it embodies or produces. Whoever controls these will control the market value of the land itself. No man will pay anything for a revenue-producing property if some one else, for example, the State, is forever to take the revenue. The owner of a piece of land which brings him an annual revenue or rent of one hundred dollars, will not find a purchaser for it if the State appropriates the one hundred dollars in the form of a tax that is to be levied year after year for all time. On the assumption that the revenue represents a selling value of two thousand dollars, the private owner will be worth that much less after the introduction of the new system.

Henry George defends this proceeding as emphatically just, and denies the justice of compensating the private owners. In the chapter of "Progress and Poverty" headed, "Claim of Land Owners to Compensation," he declares that "private property in land is a bold, bare, enormous wrong, like that of chattel slavery"; and against Mill's statement that landowners have a right to rent and to the selling value of their holdings, he exclaims: "If the land of any country belong to the people of that country, what right, in morality and justice, have the individuals called landowners to the rent? If the land belong to the people, why in the name of morality and justice should the people pay its salable value for their own?" [1]

Here, then, we have the full implication of the Georgean principle that *private property in land is essentially unjust.* It is not merely imperfect, — tolerable while unavoidable. When it can be supplanted by the right system, its inequalities must not continue under another form. The State is merely the trustee of the land, having the duty of distributing its benefits and values so as to make

[1] *Cf.* chapter entitled "Compensation" in "A Perplexed Philosopher."

effective the equal rights of all individuals. Consequently, the legal titles of private ownership which it creates or sanctions are valid only so long as nothing better is available. At best such titles have no greater moral force than the title by which an innocent purchaser holds a stolen watch; and the persons who are thereby deprived of their proper shares of land benefits, have the same right to recover them from the existing private owners that the watch-owner has to recover his property from the innocent purchaser. Hence the demand for compensation has no more merit in the one case than in the other.

To the objection that the civil laws of many civilized countries would permit the innocent purchaser of the watch to retain it, provided that sufficient time had elapsed to create a title of prescription, the Single Taxer would reply that the two kinds of goods are not on the same moral basis in all respects. He would contend that the natural heritage of the race is too valuable, and too important for human welfare to fall under the title of prescription.

To put the matter briefly, then, Henry George contends that the individual's equal right to land is so much superior to the claim of the private owner that the latter must give way, even when it represents an expenditure of money or other valuable goods. The average opponent does not seem to realize the full force of the impression which this theory makes upon the man who overemphasizes the innate rights of men to a share in the gifts of nature. Let us see whether this right has the absolute and overpowering value which is attributed to it by Henry George.

[4.] In considering this question, the supremely important fact to be kept in mind is that the natural right to land is not an end in itself. It is not a prerogative that inheres in men, regardless of its purposes or effects. It has validity only in so far as it promotes individual and

social welfare. As regards individual welfare, we must bear in mind that this phrase includes the well being of all persons, of those who do as well as of those who do not at present enjoy the benefits of private landownership. Consequently the proposal to restore to the "disinherited" the use of their land rights must be judged by its effects upon the welfare of all persons. If existing landowners are not compensated, they are deprived, in varying amounts, of the conditions of material well being to which they have become accustomed, and are thereby subjected to varying degrees of positive inconvenience and hardship. The assertion that this loss would be offset by the moral gain in altruistic feelings and consciousness, may be passed over as applying to a different race of beings from those who would be despoiled. . . .

The social consequences of the confiscation of rent and land values, would be even more injurious than those falling upon the individuals despoiled. Social peace and order would be gravely disturbed by the protests and opposition of the landowners, while the popular conception of property rights, and of the inviolability of property, would be greatly weakened, if not entirely destroyed. The average man would not grasp or seriously consider the Georgean distinction between land and other kinds of property in this connection. He would infer that purchase, or inheritance, or bequest, or any other title having the immemorial sanction of the State, does not create a moral right to movable goods any more than to land. This would be especially likely in the matter of capital. Why should the capitalist, who is no more a worker than the landowner, be permitted to extract revenue from his possessions? In both cases the most significant and practical feature is that one class of men contributes to another class an annual payment for the use of socially necessary productive goods. If rent-confiscation would benefit a large number of people, why

not increase the number by confiscating interest? Indeed, the proposal to confiscate rent is so abhorrent to the moral sense of the average man that it could never take place except in conditions of revolution and anarchy. If that day should ever arrive the policy of confiscation would not stop with land.

THE ALLEGED RIGHT OF THE COMMUNITY TO LAND VALUES

In the foregoing pages we have confined our attention to the Georgean principle which bases men's common right to land and rent upon their common nature, and their common claims to the material gifts of the Creator. Another argument against private ownership takes this form: "Consider what rent is. It does not arise spontaneously from the soil; it is due to nothing that the landowners have done. It represents a value created by the whole community. . . . But rent, the creation of the whole community, necessarily belongs to the whole community." [1]

[5.] Before taking up the main contention in this passage, let us notice that the community does not create *all* land values nor *all* rent. These things are as certainly due to nature as to social action. In no case can they be attributed exclusively to one factor. Land that has no natural qualities or capacities suitable for the satisfaction of human wants will never have value or yield rent, no matter what society does in connection with it: the richest land in the world will likewise remain valueless, until it is brought into relation with society, with at least two human beings. In general, it is probably safe to say that almost all the value of land in cities, and the greater part of the value of land in thickly settled districts, is specifically due to social action rather than to differences in fertility. Nevertheless, it remains true that the value of every piece of land arises partly from nature, and

[1] "Progress and Poverty," book VII, ch. III.

partly from society; but it is impossible to say in what proportion.

[6.] Our present concern is with those values and rents which are to be attributed to social action. These cannot be claimed by any person, nor by any community, in virtue of the individual's natural right to the bounty of nature. Since they are not included among the ready made gifts of God, they are no part of man's birthright. If they belong to all the people the title to them must be sought in some historical fact, some fact of experience, some social fact. According to Henry George, the required title is found in the fact of production. Socially created land values and rents belong to the community because the community, not the private proprietor, has produced them. Let us see in what sense the community produces the social value of land.

[*a*.] In the first place, this value is produced by the community in two different senses of the word "community," namely as a civil, corporate entity, and as a group of individuals who do not form a moral unit. Under the first head must be placed a great deal of the value of land in cities; for example, that which arises from municipal institutions and improvements, such as fire and police protection, waterworks, sewers, paved streets, and parks. On the other hand, a considerable part of land values both within and without cities is due, not to the community as a civil body, but to the community as a collection of individuals and groups of individuals. Thus, the erection and maintenance of buildings, the various economic exchanges of goods and labor, the superior opportunities for social intercourse and amusement which characterize a city, make the land of the city and its environs more valuable than land at a distance. While the activities involved in these economic and "social" facts and relations are, indeed, a social not an individual product, they are the product of small, temporary, and

shifting groups within the community. They are not the activities of the community as a moral whole. For example, the maintenance of a grocery business implies a series of social relations and agreements between the grocer and his customers; but none of these transactions is participated in by the community acting as a community. Consequently such actions and relations, and the land values to which they give rise are not due to, are not the products of the community as a unit, as a moral body, as an organic entity. What is true of the land values created by the grocery business applies to the values which are due to other economic institutions and relations, as well as to those values which arise out of the purely "social" activities and advantages. If these values are to go to their producers they must be taken, in various proportions, by the different small groups and the various individuals whose actions and transactions have been directly responsible.

To distribute these values among the producers thereof in proportion to the productive contribution of each person is obviously impossible. How can it be known, for example, what portion of the increase in the value of a city's real estate during a given year is due to the merchants, the manufacturers, the railroads, the laborers, the professional classes, or the city as a corporation? The only practical method is for the city or other political unit to act as the representative of all its members, appropriate the increase in value, and distribute it among the citizens in the form of public services, institutions, and improvements. Assuming that the socially produced value of land ought to go to its social producer rather than to the individual proprietor, this method of public appropriation and disbursement would seem to be the nearest approximation to practical justice that is available.

[*b.*] Is the assumption correct? Do the socially produced land values necessarily belong to the producer,

society? Does not the assumption rest upon a misconception of the moral validity of production as a canon of distribution? Let us examine some of the ways in which values are produced.

The man who converts leather and other suitable raw materials into a pair of shoes, increases the utility of these materials, and in normal market conditions increases their value. In a certain sense he has created value, and he is universally acknowledged to have a right to this product. . . .

But value may be increased by mere restriction of supply, and by mere increase in demand. If a group of men get control of the existing supply of wheat or cotton, they can artificially raise the price, thereby producing value as effectively as the shoemaker or the farmer. Yet none of these producers of value are regarded as having a moral right to their product.

When we turn to what is called the social creation of *land* values, we find that it takes two forms. It always implies increase of social demand; but the latter may be either purely subjective, reflecting merely the desires and power of the demanders themselves, or it may have an objective basis connected with the land. In the first case it may be due solely to an increase of population. Merely by increasing its wants the population has produced land values; but it has obviously no more right to them than have the leaders of fashion to the enhanced value which they have given to feminine headgear. On the other hand, the increased demand for land, and the consequent increase in its value, are frequently attributable specifically to changes connected with the land itself. They are changes which affect its utility rather than its scarcity. The farmer who irrigates desert land increases its utility, as it were, *intrinsically*. The community that establishes a city increases the utility of the land therein and thereabout *extrinsically*. . . .

It is increase of utility, and not either actual or virtual increase of scarcity, to which men attribute a moral claim. Why do men assign these different ethical qualities to the production of value? Why has the shoemaker a right to the value that he adds to the raw material in making a pair of shoes? What is the precise basis of his right? It cannot be labor merely; for the cotton monopolist has labored in getting his corner on cotton. It cannot be the fact that the shoemaker's labor is socially useful; for a chemist might spend laborious days and nights producing water from its component elements, and find his product a drug on the market; yet he would have no reasonable ground of complaint. Why, then, is it reasonable for the shoemaker to require, why has he a right to require payment for the utilities that he produces? Because *men want to use his products*, and because they have no right to require him to serve them without compensation. He is morally and juridically their equal, and has the same right as they to have access on reasonable terms to the earth and the earth's possibilities of a livelihood. Being thus equal to his fellows, he is under no obligation to subordinate himself to them by becoming a mere instrument for their welfare. To assume that he is obliged to produce socially useful things without remuneration, is to assume that all these propositions are false; it is to assume that his life and personality and personal development are of no intrinsic importance, and that his pursuit of the essential ends of life has no meaning except in so far as may be conducive to his function as an instrument of production. In a word, the ultimate basis of the producer's right to his product, or its value, is the fact that this is *the only way in which he can get his just share* of the earth's goods and of the means of life and personal development. His right to compensation does not rest on the mere fact of value-production.

Now, as a producer of land values, the community is not

on the same moral ground with the shoemaker. Its productive action is indirect and intrinsic, and is merely incidental to its principal activities and purposes. Land values are a by-product which do not require the community to devote thereto a single moment of time or a single ounce of effort. The activities of which land values are a by-product have already been remunerated in the price paid to the wage-earner for his labor, the physician for his services, the manufacturer and the merchant for their wares, and the municipal corporation in the form of taxes. On what ground can the community, or any part of it, set up a claim in strict justice to the increased land values? The right of the members of the community to the means of living and self-development is not dependent upon the taking of these values by the community. Nor are they treated as instruments to the welfare of the private owners who do get the socially created land values; for they expend neither time nor labor in the interest of the latter directly. Their labor is precisely what it would have been had there been no increase in the value of the land.

Since social production does not constitute a right to land values nor to rent, it affords not a shadow of justification for the confiscation of these things by the community. . . .

To sum up the conclusions of this chapter: The argument against first occupancy is valid only with regard to the abuses of private ownership, not with regard to the institution; the argument based upon the title of labor is the outcome of a faulty analysis, and is inconsistent with other statements of its author; the argument derived from men's equal rights to land merely proves that private ownership does not secure perfect justice, and the proposal to correct this defect by confiscating rent is unjust because it would produce greater evils; and the so-called production of the social values of land confers upon the community no property right whatever.

CHAPTER XXIV

PROPERTY, THE BASIS OF CIVILIZATION [1]

THERE has been, as every one knows, a long strike in the mines of Colorado, with violence on both sides and bitter recriminations. . . .

Now in regard to the truth of the charges of violence and other misconduct urged alternately by the strikers and the owners and by their sympathizers, one may be unable to decide on the evidence; nor is that the question here considered. The remarkable point is that not a single word was uttered on either side for property itself, as at least a substantial element of civilization. Such a silence was no doubt natural on the part of the strikers; but what of the owners? A hundred years ago, in England or America at least, their present attitude would have been impossible; they would have appealed boldly to the public, their public, on the basis of sheer property rights. Twenty years ago such a position as they now assume could scarcely have been anything but ignoble hypocrisy. To-day their motives cannot be classified in any such simple fashion. It is not improbable that, along with the transparent motive of policy, they are a little troubled to know

[1] [By PAUL ELMER MORE: born at St. Louis, Dec. 12, 1864; A.B. (1887), A.M. (1892), Washington University; A.M. (1893), Harvard University; LL.D. (1913), Washington University; assistant in Sanskrit (1894-95), Harvard University; literary editor (1901–03) The Independent, (1903–09) New York Evening Post, (1909–14) The Nation.

His works include: "A Century of Indian Epigrams"; "The Judgment of Socrates"; a translation of "Prometheus Bound"; "Life of Benjamin Franklin"; "Shelburne Essays"; "Platonism."

The selection above reprinted is from his "Aristocracy and Justice," "Shelburne Essays," ninth series (Boston: Houghton Mifflin Co., 1915), pages 127–148 (parts omitted).]

whether their instinctive feelings as property owners are not in some way unethical. . . .

Now what is the meaning of all this? What is the origin of this state of mind which is so manifestly illogical and self-contradictory?

We shall perhaps discover the first plain enunciation of such a growing view of property in the writings of that master of truth and sophistry, Jean-Jacques Rousseau, especially in the "Discours sur l'origine de l'inégalité" and the "Contrat social." According to the theory there developed, the most blessed stage of human existence was that exemplified by our North American Indians, who, as Rousseau pictured them from certain travelers' fairy tales, had risen to the beginning of social life, but possessed no property beyond the most rudimentary sort — none at all in our sense of the word. Happy indeed was such a state, if innocence is happiness: for, as the all-knowing Locke had observed, there can be no wrong-doing where there is no property. "It was," adds Rousseau sententiously, "the discovery of iron and grain that civilized men, and ruined the human race." Two consequences followed the creation of property: civilization and injustice. There is, Rousseau admits, a natural inequality of faculties among men, but this is of little moment until fixed and reinforced by extrinsic advantages. An unnatural inequality, or injustice, arises as soon as those who are the stronger by nature acquire increase of strength by the aid of superior possessions. And this injustice is fixed by a clever ruse. The few whose natural strength has been enhanced by property, seeing that they should still be at the mercy of the united mass of the poor and weak, delude the mass into binding themselves by passing laws in defence of property. Law is thus the support at once of civilization and of injustice.

The syllogism is rigid, and the inevitable conclusion

would be: abolish law, and let mankind return to the happier condition of barbarism. But such a conclusion forces us to reconsider our premises, and we immediately see that the argument rests on two assumptions, one true and the other false. It is a *fact* that property has been the basis of civilization, and that with property there has come a change from natural inequality to what is assumed to be unnatural injustice. But it is *not a fact* that barbarism is in general a state of innocence and happiness. Rousseau himself really knew this, and he felt also, when his words began to be taken seriously by men of affairs, that he should be merely stultifying himself if he called on them to abolish what he recognized as the basis of civilized society: under no glamour of a remote paradise would men go to work deliberately to destroy civilization, whatever might be the evils it embraced.

Hence Rousseau proceeds to develop a theory of the State which shall retain the civilization created by property, while avoiding the injustice inherent in it. To this end he would make *tabula rasa* of the existing forms of authority in government, and in their place introduce, as sole sovereign, a power which he describes as the *volonté générale*. By this he does not precisely mean socialism: for still regarding private ownership as the basis of civilization, he cannot admit collective ownership. His notion is that a government by means of the "general will," while acknowledging the need of private ownership, would do away with injustice, because, in such a State, "the sovereign, being formed only of the individuals which compose it, neither has nor can have any interest contrary to theirs." . . . Whether it means justice to you or not, may depend on your particular sympathies and interests; it manifestly does not mean a careful regard for the rights of property.

Rousseau's scheme, in fact, involves a self-contradiction: by a juggling of words it supposes that the innocence of

man in a state of nature, itself an assumption contrary to fact, can somehow be made to continue in a society which has built itself up on what he regards as the cause of injustice. In simple truth, property may rightly be called the *cause* of civilization, but, strictly speaking, it is only the *occasion* of injustice: injustice is inherent in the imperfection of man, and the development of the means of living merely brings into greater prominence what is an unavoidable feature of existence, not for man only but for the whole range of creation, in this puzzling world of ours. Rousseau, by inflaming the passions of men against the wrongs of society, which by his own hypothesis are inevitable, was, and still is, the father of frightful confusions and catastrophes; but he performed a real service to philosophy by stating so sharply the bare truth that *property is the basis of civilization.*

The socialistic theories of communal ownership give the argument, I admit, a new turn. Socialism rests on two assumptions. First, that community of ownership will, for practical purposes, eliminate the greed and injustice of civilized life. This I deny, believing it to be demonstrably false in view of the present nature of most men, and, I might add, in view of the notorious quarrelsomeness of the socialists among themselves. Secondly, that under community of control the material productivity of society will not be seriously diminished. This question I leave to the economists, though here too it would appear to follow demonstrably from the nature of man that the capacity to manage and the readiness to be managed are necessary to efficient production. Certainly, there has been a convincing uniformity in the way in which wealth and civilization have always gone together, and in the fact that wealth has accumulated only when private property was secure. So far as experience or any intelligent outlook goes, there is no sufficient motive for the

creation of property but personal ownership, at least in a share of joint property. The burden of proof is entirely on those who assert the sufficiency of communal property; their theory has never been proved, but in innumerable experiments has always failed. And, in fact, the real strength of socialism, the force that some think is driving us along the edge of revolution, is in no sense a reasoned conviction that public ownership is better than private ownership, but rather a profound emotional protest against the *inequalities* of ownership. The serious question is not in regard to the importance of property, but in regard to the justice of its present distribution. Despite all the chatter about the economic interpretation of history, we are to-day driven along by a sentiment, and by no consideration of economics.

Not even a Rousseau could cover up the fact of the initial inequality of men by the decree of that great Ruler, or Law, call it what you will, which makes one vessel for dishonor and another for honor. That is the so-called injustice of Nature. And it is equally a fact that property means the magnifying of that natural injustice into that which you may deplore as unnatural injustice, but which is a fatal necessity, nevertheless. This is the truth, hideous if you choose to make it so to yourself, not without its benevolent aspect to those, whether the favorites of fortune or not, who are themselves true — ineluctable at least. Unless we are willing to pronounce civilization a grand mistake, as, indeed, religious enthusiasts have ever been prone to do (and humanitarianism is more a perverted religion than a false economics), unless our material progress is all a grand mistake, we must admit, sadly or cheerfully, that any attempt by government or institution to ignore that inequality may stop the wheels of progress or throw the world back into temporary barbarism, but will surely not be the cause of wider and greater happiness.

It is not heartlessness, therefore, to reject the sentiment

of the humanitarian, and to avow that the security of property is the first and all-essential duty of a civilized community. And we may assert this truth more bluntly, or, if you please, more paradoxically. Although, probably, the rude government of barbarous chiefs, when life was precarious and property unimportant, may have dealt principally with wrongs to person, yet the main care of advancing civilization has been for property. After all, life is a very primitive thing. Nearly all that makes it more significant to us than to the beast is associated with our possessions — with property, all the way from the food we share with the beasts, to the most refined products of the human imagination. To the civilized man *the rights of property are more important than the right to life.*

It is safer, in the utterance of law, to err on the side of natural inequality than on the side of ideal justice. We can go a little way, very slowly, in the endeavor to equalize conditions by the regulation of property, but the elements of danger are always near at hand and insidious; and undoubtedly any legislation which deliberately releases labor from the obligations of contract, and permits it to make war on property with impunity, must be regarded as running counter to the first demands of society. It is an ugly fact, as the world has always seen, that, under cover of the natural inequality of property, evil and greedy men will act in a way that can only be characterized as legal robbery. It is strictly within the province of the State to prevent such action so far as it safely can. Yet even here, in view of the magnitude of the interests involved, *it is better that legal robbery should exist along with the maintenance of law, than that legal robbery should be suppressed at the expense of law.*

No doubt there is a certain cruelty in such a principle, as there is a factor of cruelty in life itself. But it does

not, in any proper sense of the word, involve the so-called economic interpretation of history. On the contrary, this principle recognizes, far more completely than does any humanitarian creed, that there is a large portion of human activity lying quite outside of the domain of physical constraint and legislation, and it is supremely jealous that the arms of government should not extend beyond their true province. All our religious feelings, our aspiring hopes, our personal morality, our conscience, our intellectual pursuits, all these things, and all they mean, lie beyond the law — all our individual life, as distinguished from the material relations of man with man, reaches far beyond the law's proper comprehension.

Our most precious heritage of liberty depends on the safeguarding of that realm of the individual against the encroachments of a legal equalitarianism. For there is nothing surer than that *liberty of the spirit*, if I may use that dubious word, is bound up with the *inequality of men* in their natural relations; and every movement in history to deny the inequalities of nature has been attended, and by a fatal necessity always will be attended, with an effort to crush the liberty of distinction in the ideal sphere.

As the rights of property do not involve the economic interpretation of history, so neither do they result in materialism. The very contrary. For in this matter, as in all other questions of human conduct and natural forces, you may to a certain degree control a fact, but if you deny a fact it will control you. This is the plain paradox of life, and its application is everywhere. Just so sure as you see a feministic movement undertaking to deny the peculiar characteristics and limitations of the female sex, you will see this sex element overriding all bounds — you will, to take an obvious illustration, see women dressing in a manner to exaggerate their relative physical disability and their appeal to the other sex. . . .

And the same paradox holds true of property. You may to a certain extent control it and make it subservient to the ideal nature of man; but the moment you deny its rights, or undertake to legislate in defiance of them, you may for a time unsettle the very foundations of society, you will certainly in the end render property your despot instead of your servant, and so produce a materialized and debased civilization. . . .

It is in accordance with the law of human nature that the sure way to foster the spirit of materialism is to unsettle the material basis of social life. Manifestly, the mind will be free to enlarge itself in immaterial interests only when that material basis is secure, and without a certain degree of such security a man must be anxious over material things and preponderantly concerned with them. And, manifestly, if this security is dependent on the rights of property, and these rights are denied or belittled in the name of some impossible ideal, it follows that the demands of intellectual leisure will be regarded as abnormal and anti-social, and that he who turns to the still and quiet life will be despised as a drone, if not hated as an enemy of the serious part of the community. There is something at once comical and vicious in the spectacle of those men of property who take advantage of their leisure to dream out vast benevolent schemes which would render their own self-satisfied career impossible.

No doubt the ideal society would be that in which every man should be filled with noble aspirations, and should have the opportunity to pursue them. But I am not here concerned with such Utopian visions, nor, as I have said, am I arguing with those who are honestly persuaded that a socialistic régime is, in our day, or any day, economically or psychologically feasible. My desire is rather to confirm in the dictates of their own reason those who believe that the private ownership of property, including its production and distribution, is, with very limited reserva-

tions, essential to the material stability and progress of society. . . .

One shudders to think of the bleak pall of anxiety and the rage of internecine materialism that would fall upon society were the laws so altered as to transfer the predominant rights from property acquired to the labor by which it is produced. For *if property is secure, it may be the means to an end, whereas if it is insecure it will be the end itself.*

TITLE II D: FUNCTIONAL AND SOCIAL TRUST THEORIES

CHAPTER XXV

THE FUNCTIONAL THEORY OF PROPERTY[1]

Property ceasing to be a Subjective Right of the Owner, and becoming a Social Function of the Possessor. — The classical jurists will, perhaps, find a contradiction in the title "Property as a Function." They believe that of itself and by definition property is a determinate thing in the law; that it is necessarily and always that determinate thing, and that, if it ceased to be so, it would no longer be property. I have already expressed my opinion of this "a priori" and dogmatic method of viewing the law; if I call it again to your attention it is because that method has asserted itself and is still asserting itself in the law of property more than in any other field.

It is not denied that property grew up in the law to answer an economic need (as indeed is true of all law) and that it necessarily is developing along with those economic

[1] [By Léon Duguit: born at Libourne, Gironde, France, Feb. 4, 1859; agrégé professor of law at Caen (1883–1892); professor of constitutional law, University of Bordeaux, 1892– .

His works include: "La séparation des pouvoirs et l'assemblée Constituante de 1789" (1894): "L'État: le droit objectif et la loi positive" (1901); "L'État, les gouvernants, et les agents" (1903); "Traité de droit constitutionnel" (1911); "Manuel de droit constitutionnel," 3d ed., 1917 ; "Les transformations générales du droit privé depuis le Code Napoléon" (1912); "Les transformations du droit public" (1913).

The selection above reprinted is from the translation (by Layton B. Register) of his "Les transformations générales du droit privé" (being chapter III of "Progress of Continental Law in the 19th Century," Boston: Little, Brown & Co., 1918: Continental Legal History Series, vol. XI), pages 44–52, 129–143.]

needs. But in modern communities the economic need which was answered by the law of property is undergoing a profound alteration. Here, too, the evolution is in a social sense; its direction is being determined by an ever-stricter interdependence of the various elements that compose the social community. In this way property is *socialized*, if I may use the term. That does not mean that it is becoming *collective* in the economic sense. It means two things: first, that private ownership is ceasing to be a private right and becoming a social function; and second, that those instances of the application of wealth to collective uses which should be legally protected, are becoming more and more numerous.[1]

I should add an important limitation. In my inquiry I shall consider exclusively what economists call capitalistic property, and not property in objects destined for consumption. The latter presents an altogether different character, and it would not be true to say that it is undergoing a social evolution. As to capitalistic property, however, I shall speak of all classes, personality as well as realty. In both these classes the evolution is the same. It appears, however, in perhaps a more striking manner in the case of realty and for that reason it shall serve as my example.

General Economic Need met by the Legal Theory of Property. — To what economic need did the law of property in a general way answer? A very simple need and one apparent in every society: the need of applying certain wealth to definite individual or collective uses, and consequently the necessity that society guarantee and protect that application. What is required to accomplish this? Two things: first, as a general rule, every act

[1] The evolution which I propose to describe, is, I think, much less advanced in the countries of South America than of Europe, particularly France and England. I shall speak from the French point of view. (See the work of Ely, "Property and Contract in their Relation to the Distribution of Wealth" (2 vols., N. Y. 1914), for a full discussion of the theory of property as a social function. — Ed.)

which conforms with one of these uses must be sanctioned; and second, all acts contrary to them must be restrained by society.

The social instrumentality developed to attain this double end is property, in the legal sense of the word. To ask what is the legal conception of property, is to inquire what the conception is on which rests that social instrumentality whose object is to protect the application of wealth to individual or collective uses, sanctioning acts done in accordance with this purpose and restraining acts done contrary to them.

Property under the Individualistic System. — How have the codes founded on the individualistic principle developed this social instrumentality? Very simply. In the first place, those who drafted the codes were not concerned with inquiring into the legality of property rights then in fact existing, nor with determining on what they were founded. They accepted existing facts and declared them inviolable. Furthermore, being profoundly individualistic, they had in mind only the application of wealth to individual ends, for this is the very fulfillment, the very cornerstone, as it were, of individual autonomy. They did not, and have not since, been able to understand anything but a *protection* thrown about the individualistic use of property. They believed that the only way of protecting such a use was to endow the holder with a subjective right, absolute in duration and in effect. The right attached to the thing appropriated, and the duty corresponding to this right rested on all persons other than the owner of the thing. In a word, they adopted the rigid legal construction of the Roman "dominium."

The declarations of principles which created this system are well known. Article 17 of the "Declaration of the Rights of Man" of 1789 begins: "Property being a sacred and inviolable right," etc. Article 17 of the Argentine Constitution declares that: "Property is inviolable . . ."

Consequences Rejected To-day. — The consequences of the conception of property as a right are well known; it will be well, however, to recall the principal ones.

In the first place, the owner, having the right to use, benefit by, and to dispose of the thing which is the object of his ownership, has, for like reasons, the right *not to use it*, not to derive benefit from, and not to dispose of it; consequently to leave his lands uncultivated, his city lots unimproved, his houses untenanted and unrepaired, his capital consisting of personal property unproductive.

The right of property is *absolute*. It is absolute even as against public authority, which can, indeed, place upon it certain restrictions of a police nature, but cannot lay hands upon it, save after paying a just indemnity. It is absolute in so far as it affects individuals and, in the words of Baudry-Lacantinerie, the owner "may lawfully perform upon the object of his ownership acts even though he have no demonstrable interest in performing them," and if in so doing he injures another party, "he is not liable, because he is but acting within his right." [1]

The right of ownership is also absolute *in duration*. Upon this attribute is based the right of transmitting property by will, because the owner or title-holder of an absolute right has logically the power of disposing of his property both during his life and also for a time after his death.

It is easy to show that as a matter of fact none of these consequences represents the truth; at least in certain countries, notably in France. To be less categorical, I

[1] Baudry-Lacantinerie, "Droit civil" (10th ed., 1908), Vol. I, No. 1296, p. 726. I should, however, add that this statement is not found in the 11th ed. published in collaboration with Cheneaux (1912), No. 1296, p. 738. But Cheneaux declares that the owner "enjoys the object as he pleases and, if he desires, in an abusive manner." Baudry's collaborators have been far less categorical regarding property as an absolute right. Chauveau, "Des biens," No. 215, writes: "In spite of its absolute character, ownership must still be circumscribed within reasonable limits." Barde, "Des obligations," Vol. IV, No. 2855, p. 342, says: "The truth is that there is no absolute right and that ownership itself is not an absolute right but subject to limitations."

will say that the entire individualistic system of property law is disappearing. This assertion is not unfounded; it is based upon a direct observation of facts, for both in statutory and in case-law there is appearing a body of principles directly opposed to the consequences of the individualistic system. Is this not proof that the legal system from which those consequences spring is breaking down and disappearing?

The general causes of this disappearance are again those that we have studied above, which are determining the direction of the general transformation of individualistic institutions.

First, property, as a subjective right, is a purely *metaphysical* conception, in radical opposition to modern positivism. To say that the possessor of capital has a right over it, is equivalent to saying that he has a power, of itself superior to, and prescribable upon, the will of other individuals. The "dominium" of the individual is no more intelligible as a right than the "imperium" of the Government as the seat of force.

Furthermore, the individualistic system of property is breaking down because it tends to protect *individual uses alone*, which are considered as sufficient in themselves. The system reflected perfectly the individualistic conception of the society of the period. It found a perfect medium of expression in Article 2 of the "Declaration of Rights of Man" of 1789: "The aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are: liberty, property, security, and resistance to oppression." If the application of wealth to private uses was protected, it was solely out of consideration of the individual; it was solely the utility to the individual that was kept in view. To-day there is a very clear sense abroad that the individual is not the end but the means; that the individual is only a wheel of a huge mechanism, the body

social; and that his only reason to exist is the part which he performs in the labor of society. The individualistic system is seen, therefore, to be in open opposition to the temper of the modern conscience.

Finally, the individualistic system of property is vanishing because it was developed solely to protect the application of wealth to individual interests, and therefore was useless in protecting its application to *collective purposes*. This reason also involves the problem of collective personality which we have already studied.

The Owner's Obligations. — Such is the basis of the new conception of property. In modern life, where a deep and well-defined consciousness of social interdependence has become dominant, liberty has been transformed into a duty of the individual to employ his physical, intellectual, and moral forces to enrich this interdependence. In just the same way property has become for its possessor an objective duty or obligation to employ his wealth to support and enlarge social interdependence.

Every individual is under an obligation to perform a certain function in the community, determined directly by the station which he occupies in it. The possessor of wealth, by reason simply of his possession, is enabled thereby to accomplish a certain work where others can not. He alone can increase the general stock of wealth by putting his capital to use. For social reasons he is under a duty, therefore, to perform this work and society will protect his acts only if he accomplishes it and in the measure in which he accomplishes it. Property is no longer a subjective right of the owner; it is the social function of the possessor of wealth.

Again, it was Auguste Comte who in the 1800s first gave prominence to this idea. In 1850 he wrote "In any normal phase of human history, each citizen really is a public officer, whose functions, more or less clearly defined as the case may be, determine both his obligations and

his powers. This universal principle should certainly be extended to property; for property is preëminently a field where positivism discovers an indispensable social function, namely, to procure and administer the capital by which each generation prepares the work of the succeeding generation. Wisely understood, this normal view of the use of wealth ennobles it without curtailing any reasonable liberty as to its exercise; indeed it even increases respect for it." [1] . . .

I am anxious to avoid being misunderstood in this matter. I do not say, and I have never said or written, that private ownership as an economic institution is disappearing or should *disappear*. I maintain merely that the *legal notion* upon which protection of property is founded is *being modified*. Individual ownership, nevertheless, continues to be protected against all attacks, even those of the State. I will go even further and say that it is more strongly protected under the new than under the old conception.

I accept also as a fact the possession of capitalistic wealth by a limited number of individuals. There is no need to criticise or justify the fact; it would, indeed, be labor lost, for the reason that it is a fact. Nor shall I inquire whether (as certain schools of thought assert) there is an irreconcilable conflict between those who possess wealth and those who do not, between capital and labor, and whether in this conflict capital is to be despoiled and annihilated. I cannot refrain, however, from voicing the opinion that these schools take an altogether erroneous view. The structure of modern society is not so simple. In France, in particular, many persons are both capitalists and laborers. It is a crime to preach the struggle of classes; I believe that we are moving, not toward the destruction

[1] Auguste Comte, "Système de politique positive" (ed. 1892), Vol. I, p. 156 *Cf.* also on the question of the social use of property: Landry, "De l'utilité sociale de la propriété individuelle" (1901); Hauriou, "Principes de droit public" (1910). p. 39.

of one class by another, but towards a society where there will be a coördination and a hierarchy of classes.

The Obligation to Cultivate Land. — The conception of property as a function, and the idea of society extending its protection to the application of wealth to certain uses, provide a very simple and clear explanation of the laws and decisions which are repugnant to the conception of property as a right.

An objection has been repeatedly raised to this explanation. Opponents have argued: "We understand your view; we even admit that society is moving toward a system of law in which the right of property will rest upon the duty of the owner to fulfill a certain function. But we have not yet reached that state; and the proof is that no statute yet imposes upon an owner the obligation to cultivate his field, repair his house, or utilize his capital. And yet that is the necessary and logical consequence of the conception of property as a function." [1]

The objection does not embarrass me. From the fact that the law does not yet directly force the owner to cultivate his land or repair his houses or utilize his capital, it cannot be concluded that the idea of social function has not yet supplanted the idea of a subjective right of property. Such a law has indeed not made its appearance, because the need for it has not yet been felt. In France, for example, the amount of land left uncultivated by the owner or the number of houses which are unproductive is insignificant in comparison to the total capital in real estate which is being worked. But the fact that the question of such a law has been raised is itself evidence of the transformation that has taken place. Fifty years ago such a question was in no man's mind; to-day it is everywhere agitated. And if, in a country like France, the time should come when the non-cultivation of the land became a serious problem, no one would then deny,

[1] *Cf.* notably Jèze, "Revue du droit public" (1909), p. 193.

certainly, the justification of intervention by legislation. As to the non-employment or hoarding of capital consisting of personalty, the legislator will have difficulty in his attack. However, it cannot be doubted but that, were he able to discover the unproductive accumulation, he should prohibit and prevent it.[1] . . .

The Tax upon Unearned Increment, in England and Germany. — Though less rapid than in the countries of South America and especially the Argentine Republic, the automatic rise in land values in rural and urban districts, independent of any labor spent upon them, is taking place all over Europe. So long as the conception of property as a right held sole dominion, excluding all other conceptions, the question of touching directly or indirectly this increment, which is due to no act of the owner but in spite of his inactivity, did not arise. To-day, however, this question is raising its head everywhere, and in two countries (certainly of no little importance), England and Germany, a duty has just been laid upon the unearned increment of land.

In England, the Finance Act of 1910 provides by Article 1 for the establishment of a tax called an "increment value duty": "Subject to the provisions of this Part of

[1] In his "Principes de droit public" (1910), p. 38, Hauriou says very justly: "And finally we reach the most individualistic of individual rights, the right of private property. The element of function is hidden within it. . . . Certainly the owner is not now bound to cultivate his land; but we count upon frequent transfers of ownership. . . . We know that if one owner does not cultivate his land the next owner will, and that it will be in the interest of a very great majority to cultivate. . . . Everything has been skillfully calculated that the economic function of ownership might be assured by the simple play of liberty. But, if some day it becomes clear that the cultivation is not thereby secured in sufficient proportion, there is no doubt that a legal obligation to perform that function under penalty of expropriation would be forthcoming." Hauriou correctly instances how such an obligation exists in colonial grants of land, and also in mining concessions which endure only during the period of actual working. This is in fact illustrated by Article 49 of the Act of April 21, 1810, and Article 10 of the Act of April 27, 1837. The scope of these provisions has indeed been questioned; but the obligation to exercise the grant is certainly formally recognized and strongly sanctioned by the bill which has now been before the Chamber of Deputies for several years.

this Act, there shall be charged, levied and paid on the increment value of any land a duty, called increment value duty, at the rate of one pound for every complete five pounds of that value accruing after the thirtieth day of April, 1909. . . ." [1] By Article 13, upon the expiration of every lease, a duty is charged upon the value of the benefit accruing to the lessor. It is called "revision duty," and amounts to one pound for every complete ten pounds of that value. But that is not all. The same English Act attacks the inactive land owner and levies a special duty upon the site value of undeveloped lands. It provides (Article 16): "Subject to the provisions of this Part of this Act, there shall be charged, levied and paid for the financial year ending the thirty-first day of March, 1910, and every subsequent financial year in respect of the site value of undeveloped land, a duty, called undeveloped land duty, at the rate of one halfpenny for every twenty shillings of that site value." . . .

It will not be unprofitable to compare these laws with a French Act, little known and rarely if ever applied. The Act of September 16, 1807, Article 30, permits, where land benefits by a public undertaking, of the recovery from the owner thereof of a part of the increment due to the undertaking. It says: "When as a result of the undertaking already mentioned, when by the opening of new streets . . . or by any other public work of a general nature, or of the Department or Municipality, ordered or approved by the Government, private owners shall have benefited by a marked increase in the value of their lands, such lands may be charged with the payment of an indemnity as high as one half the benefit accruing to them." [2]

[1] 10 Edw. VII, Chap. 8, Art. I; "Law Reports, Statutes," Vol. 48 (1910), p. 10.

[2] *Cf.* the report of Bonnevay made to the Chamber of Deputies, advising the rejection of the Act, proposed by Carnaud and several other members (July 11, 1907), to assure to Municipalities participation in the increment of land values

Modern Doctrines as to Use of Property. — This objection answered, it is an easy task to define what I shall call the scope of the conception of property as a function, and to show that the propositions in which it may be formulated fit perfectly with the late cases and laws. By reference to what has been said regarding the fact of social interdependence and the division of labor, I come naturally to the two following conclusions:

1. The owner has the duty and, therefore, the power to employ his wealth to satisfy individual needs and especially *his own needs*, and to employ his wealth for the development of his physical, intellectual, and moral forces. It should not be forgotten that the development of the division of labor in society is in direct proportion to the development of the forces of the individual.

2. The owner has the duty and, therefore, the power to employ his property to the satisfaction of the *needs of the community*, the nation, or some part of the nation.

Now, my first proposition is that the owner has the duty and, therefore, the power to employ his wealth to satisfy his individual needs. But it goes without saying that this power embraces only those acts compatible with the exercise of individual liberty such as I have already defined it, that is to say, with the free development of one's individual forces. Acts done with another purpose than that of public usefulness will be held contrary to the law of property and give reason for repression or indemnity.

This explains very simply and logically those rules of law which recognize and sanction the prohibition against an owner's doing with his wealth some act lacking utility. Modern law is explainable on these grounds, without resort to contradictory and irrelevant doctrines of the

resulting from public improvements. Bonnevay declared, speaking for the Committee, that the terms of the Act of September 16, 1807, Art. 30, and of the Act of May 3, 1841, Art. 51, were amply sufficient. See "Journal Officiel, documents parlementaires," Chamber of Deputies, extraordinary session, 1909, No. 2, 813, p. 60.

"abuse of power" (discussed later) and of the limitation of the right of property, founded upon the impossible distinction between a normal and abnormal use of that right. If, in spite of the serious damage it causes my neighbor, I may lawfully construct upon my land a house which returns me a revenue, it is because I employ my wealth in my own interest, true; but also for a purpose beneficial to social interdependence. I fulfill the social task which my possession of that land enables me to fulfill. I secure the satisfaction of social needs. On the other hand, the Courts have very correctly held that I may not be allowed to construct a screen-fence on my land, or a false chimney on the roof of my house, or to excavate without purpose in my garden, because, in doing so, I perform acts without utility to myself or benefit to society. . . .

The Doctrine as to Misuse of Property. — Let us now return for a moment to consider the modern development of the principle of "misuse of right." [1]

As early as 1855, it was decided that "if in principle the right of property is a right in a sense absolute, authorizing the owner to use and abuse the object of his ownership, nevertheless the exercise of that right, like any other, must be limited to the satisfaction of a serious and lawful interest." [2] So an owner was ordered to take down a blind wall which he had erected on his land, the Court saying: ". . . X cannot without 'abusing his right' maintain a blind wall presenting no utility to himself and serving only to injure his neighbors." [3]

The classic individualists have vigorously maintained the principle of property as an absolute right, and have criticised these decisions of the Courts. Baudry-Lacantinerie,[4] especially, says: "By constructing a wall on my

[1] "Abus de droit."
[2] Court of Colmar, May 2, 1855, Dalloz, 1856, II, p. 9.
[3] Court of Gex, July 27, 1900, Sirey, 1901, II, p. 147.
[4] "Droit civil" (9th ed.), II, p. 424.

land, which is free from any servitude, I close the view which the house of my neighbor enjoyed over the country; I owe no indemnity because I only make use of my right: 'Neminem laedit qui suo jure utitur.'" Others, though hesitatingly, have accepted the idea of a limitation to the right of property. But to limit the right of property save in the case of easements in benefit of the public is a grave matter. Is it not destroying the right itself? Then, too, upon what is this limitation to be based, how is it to be measured?

These difficulties have raised discussions and academic distinctions which have resulted in nothing. This was inevitable. . . .

It has been thought that these contradictions and difficulties are avoided by a theory, seductive, certainly, at first sight, which still enjoys a larger credit. It has been adopted by the civil codes of Germany and Switzerland; in France it has been the object of very scientific study, notably by Saleilles, Josserand, Ferron, and Ripert. The German Civil Code, in Article 226, says: "The exercise of a right which can only have the purpose of causing injury to another is unlawful:" and Art. 3, Sect. 2 of the Swiss Civil Code declares that: "The law does not protect one who clearly misuses his right."

I admire their effort to construct this theory of the "misuse of right." But it cannot succeed, because the theory contradicts itself at the very outset. To say that the abusive exercise of a right is not permitted, or further, that the law does not protect one who clearly misuses his right, is simply saying that one may not do something that one has not the right to do, or that the prerogatives belonging to a given right are being exceeded. There is nothing novel in that. The theory of the "misuse of right" contains nothing specific in itself. I do not agree with Planiol [1] that the phrase "'abusive exercise of rights' is

[1] "Droit civil," II, 871.

a war of words." But, like him, I believe that, if there is a right, it ceases where the misuse commences.

The truth is that this theory or at least this phrase, *misuse of right*, is explained by its history. It was a means originated by lawyers to avoid the consequences which logically flowed from the absolute character of the right of property, and yet to maintain this characteristic. The "misuse of power" and the "misuse of right" were means invented to counteract the consequences of the absolute character attributed to "imperium" and "dominium." We have come to recognize that misusing one's power is identical with exceeding one's power; we should now recognize that misusing one's right of property and exceeding the limitations placed upon one's right of property are identical. That is why the theory of the "misuse of right" does not explain the ground of the liability of the owner, or why the advocates of this theory are as embarrassed as those who simply declare that the right of property itself is limited. . . .

CHAPTER XXVI

PROPERTY AS A FUNCTION, NOT A RIGHT: ANOTHER VIEW[1]

Rights and Functions. A function may be defined as an activity which embodies and expresses the idea of *social purpose.* The essence of it is that the agent does not perform it merely for personal gain or to gratify himself, but recognizes that he is responsible for its discharge to some higher authority. The purpose of industry is obvious. It is to supply man with things which are necessary, useful or beautiful, and thus to bring life to body or spirit. In so far as it is governed by this end, it is among the most important of human activities. In so far as it is diverted from it, it may be harmless, amusing, or even exhilarating to those who carry it on, but it possesses no more social significance than the orderly business of ants and bees, the strutting of peacocks, or the struggles of carnivorous animals over carrion.

Men have normally appreciated this fact, however unwilling or unable they may have been to act upon it; and therefore from time to time, in so far as they have been able to control the forces of violence and greed, they have adopted various expedients for emphasizing the social quality of economic activity. It is not easy,

[1] [By RICHARD HENRY TAWNEY: born at Calcutta, 1880.
His works include: "The Agrarian Problem in the Sixteenth Century"; "English Economic Doctrine: Select Documents"; "Studies on the Minimum Wage."
The selection above reprinted is from his "The Acquisitive Society" (New York: Harcourt, Brace & Howe, 1920), chapters II, II , IV (parts omitted). It is reprinted here by permission of the publishers.]

however, to emphasize it effectively, because to do so requires a constant effort of will, against which egotistical instincts are in rebellion, and because, if that will is to prevail, it must be embodied in some social and political organization, which may itself become so arbitrary, tyrannical and corrupt as to thwart the performance of function instead of promoting it. When this process of degeneration has gone far, as in most European countries it had by the middle of the eighteenth century, the indispensable thing is to break the dead organization up and to clear the ground. In the course of doing so, the individual is emancipated and his rights are enlarged; but the idea of social purpose is discredited by the discredit justly attaching to the obsolete order in which it is embodied.

It is not surprising, therefore, that in the new industrial societies which arose on the ruins of the old régime the dominant note should have been the insistence upon *individual rights*, irrespective of any social purpose to which their exercise contributed. . . .

The natural consequence of the abdication of authorities which had stood, however imperfectly, for a common purpose in social organization, was the gradual disappearance from social thought of the idea of purpose itself. What remained when the keystone of the arch was removed, was private rights and private interests. . . .

The result of such ideas in the world of practice was a society which was ruled by law, not by the caprice of Governments, but which recognized no moral limitation on the pursuit by individuals of their economic self-interest. . . .

The Acquisitive Society. This doctrine has been qualified in practice by particular limitations to avert particular evils and to meet exceptional emergencies. But it is limited in special cases precisely because its general validity is regarded as beyond controversy, and,

up to the eve of the [late] war, it was the working faith of modern economic civilization. What it implies is, that the foundation of society is found, not in *functions*, but in *rights;* that rights are not deducible from the discharge of functions, so that the acquisition of wealth and the enjoyment of property are contingent upon the performances of services, but that the individual enters the world equipped with rights to the free disposal of his property and the pursuit of his economic self-interest, and that these rights are anterior to, and independent of, any service which he may render. . . .

No one has forgotten the opposition offered in the name of the rights of property to factory legislation, to housing reform, to interference with the adulteration of goods, even to the compulsory sanitation of private houses. "May I not do what I like with my own?" was the answer to the proposal to require a minimum standard of safety and sanitation from the owners of mills and houses. . . .

The enjoyment of property and the direction of industry are considered, in short, to require no social justification, because they are regarded as rights which stand by their own virtue, not functions to be judged by the success with which they contribute to a social purpose. To-day that doctrine, if intellectually discredited, is still the practical foundation of social organization. How slowly it yields even to the most insistent demonstration of its inadequacy is shown by the attitude which the heads of the business world have adopted to the restrictions imposed on economic activity during the War. . . .

A society which aimed at making the acquisition of wealth contingent upon the discharge of social obligations, which sought to proportion remuneration to service and denied it to those by whom no service was performed, which inquired first not what men possess but what they can make or create or achieve, might be called a Functional

Society, because in such a society the main subject of social emphasis would be the performance of functions. But such a society does not exist, even as a remote ideal, in the modern world, though something like it has hung, an unrealized theory, before men's minds in the past. Modern societies aim at protecting economic rights, while leaving economic functions, except in moments of abnormal emergency, to fulfill themselves. The motive which gives color and quality to their public institutions, to their policy and political thought, is not the attempt to secure the fulfillment of tasks undertaken for the public service, but to increase the opportunities open to individuals of attaining the objects which they conceive to be advantageous to themselves. . . .

Such societies may be called Acquisitive Societies, because their whole tendency and interest and preoccupation is to promote the acquisition of wealth. The appeal of this conception must be powerful, for it has laid the whole modern world under its spell. By fixing men's minds, not upon the discharge of social obligations, which restricts their energy, because it defines the goal to which it should be directed, but upon the exercise of the right to pursue their own self-interest, it offers unlimited scope for the acquisition of riches, and therefore gives free play to one of the most powerful of human instincts. To the strong it promises unfettered freedom for the exercise of their strength; to the weak the hope that they too one day may be strong. Before the eyes of both it suspends a golden prize, which not all can attain, but for which each may strive, the enchanting vision of infinite expansion. It assures men that there are no ends other than their ends, no law other than their desires, no limit other than that which they think advisable. Thus it makes the individual the center of his own universe, and dissolves moral principles into a choice of expediencies. . . .

Property and Creative Work: [1.] The application of the principle that society should be organized upon the basis of functions, is not recondite, but simple and direct. It offers in the first place, a standard for discriminating between those types of private property which are legitimate and those which are not. During the last century and a half, political thought has oscillated between two conceptions of property, both of which, in their different ways, are extravagant. On the one hand, the practical foundation of social organization has been the doctrine that the particular forms of private property which exist at any moment are a thing sacred and inviolable, that anything may properly become the object of property rights, and that, when it does, the title to it is absolute and unconditioned. The modern industrial system took shape in an age when this theory of property was triumphant. The American Constitution and the French Declaration of the Rights of Man both treated property as one of the fundamental rights for the protection of which Governments exist.

On the other hand, the attack has been almost as undiscriminating as the defense. "Private property" has been the central position against which the social movement of the last hundred years has directed its forces. The criticism of it has ranged from an imaginative communism in the most elementary and personal of necessaries, to prosaic and partially realized proposals to transfer certain kinds of property from private to public ownership, or to limit their exploitation by restrictions imposed by the State. But, however varying in emphasis and in method, the general note of what may conveniently be called the Socialist criticism of property is what the word Socialism itself implies. Its essence is the statement that the economic evils of society are primarily due to the unregulated operation, under modern conditions of industrial organization, of the institution of private property.

The divergence of opinion is natural, since in most discussions of property the opposing theorists have usually been discussing different things. Property is the most ambiguous of categories. It covers a multitude of rights which have nothing in common except that they are exercised by persons and enforced by the State. Apart from these formal characteristics, they vary indefinitely in economic character, in social effect, and in moral justification. They may be conditional like the grant of patent rights, or absolute like the ownership of ground rents, terminable like copyright, or permanent like a freehold, as comprehensive as sovereignty or as restricted as an easement, as intimate and personal as the ownership of clothes and books, or as remote and intangible as shares in a gold mine or rubber plantation. It is idle, therefore, to present a case for or against private property without specifying the particular forms of property to which reference is made. The journalist who says that "private property is the foundation of civilization" agrees with Proudhon, who said it was theft, in this respect at least that, without further definition, the words of both are meaningless. Arguments which support or demolish certain kinds of property may have no application to others; considerations which are conclusive in one stage of economic organization may be almost irrelevant in the next. The course of wisdom is neither to attack private property in general nor to defend it in general; for things are not similar in quality, merely because they are identical in name. It is to discriminate between the various concrete embodiments of what, in itself, is, after all, little more than an abstraction.

[2.] The origin and development of different kinds of proprietary rights is not material to this discussion. Whatever may have been the historical process by which they have been established and recognized, the rationale of private property traditional in England is that which

sees in it the security that each man will *reap where he has sown*. "If I despair of enjoying the fruits of labor," said Bentham, repeating what were in all essentials the arguments of Locke, "I shall only live from day to day; I shall not undertake labors which will only benefit my enemies." Property, it is argued, is a moral right, and not merely a legal right, because it insures that the producer will not be deprived by violence of the result of his efforts. The period from which that doctrine was inherited differed from our own in three obvious, but significant, respects. Property in land and in the simple capital used in most industries was widely distributed. Before the rise of capitalist agriculture and capitalist industry, the ownership, or at any rate the secure and effective occupation, of land and tools by those who used them, was a condition precedent to effective work in the field or in the workshop. The forces which threatened property were the fiscal policy of Governments and in some countries, for example France, the decaying relics of feudalism. . . .

Whatever the future may contain, the past has shown no more excellent social order than that in which the mass of the people were the masters of the holdings which they plowed and of the tools with which they worked, and could boast, with the English freeholder, that "it is a quietness to a man's mind to live upon his own and to know his heir certain." With this conception of property and its practical expression in social institutions those who urge that society should be organized on the basis of function have no quarrel. It is in agreement with their own doctrine, since it justifies property by reference to the services which it enables its owner to perform. All that they need ask is that it should be carried to its logical conclusion.

[3.] For the argument has evidently more than one edge. If it justifies certain types of property, it condemns

others; and in the conditions of modern industrial civilization, what it justifies is less than what it condemns. The truth is, indeed, that this theory of property and the institutions in which it is embodied have survived into an age in which the whole structure of society is radically different from that in which it was formulated, and which made it a valid argument, if not for all, at least for the most common and characteristic kinds of property. It is not merely that the ownership of any substantial share in the national wealth is concentrated to-day in the hands of a few hundred thousand families, and that at the end of an age which began with an affirmation of the rights of property, proprietary rights are, in fact, far from being widely distributed. Nor is it merely that what makes property insecure to-day is not the arbitrary taxation of unconstitutional monarchies or the privileges of an idle *noblesse*, but the insatiable expansion and aggregation of property itself, which menaces with absorption all property less than the greatest, the small master, the little shopkeeper, the country bank, and has turned the mass of mankind into a proletariat working under the agents and for the profit of those who own.

The characteristic fact, which differentiates most modern property from that of the pre-industrial age, and which turns against it the very reasoning by which formerly it was supported, is that in modern economic conditions ownership is not *active*, but *passive*, that to most of those who own property to-day it is not a means of work but an instrument for the acquisition of gain or the exercise of power, and that there is no guarantee that gain bears any relation to service, or power to responsibility. For property which can be regarded as a condition of the performance of function, like the tools of the craftsman, or the holding of the peasant, or the personal possessions which contribute to a life of health and efficiency, forms an insignificant proportion, as far as its value is concerned,

of the property rights existing at present. In modern industrial societies the great mass of property consists, as the annual review of wealth passing at death reveals, neither of personal acquisitions such as household furniture, nor of the owner's stock-in-trade, but of rights of various kinds, such as royalties, ground-rents, and, above all, of course, shares in industrial undertakings which yield an income irrespective of any personal service rendered by their owners. Ownership and use are normally divorced. The greater part of modern property has been attenuated to a pecuniary lien or bond on the product of industry which carries with it a right to payment, but which is normally valued precisely because it relieves the owner from any obligation to perform a positive or constructive function.

Such property may be called passive property, or property for acquisition, for exploitation, or for power, to distinguish it from the property which is actively used by its owner for the conduct of his profession or the upkeep of his household. To the lawyer the first is, of course, as fully property as the second. It is questionable, however, whether economists shall call it "Property" at all, and not rather, as Mr. Hobson has suggested, "Improperty," since it is not identical with the rights which secure the owner the produce of his toil, but is opposite of them. A classification of proprietary rights based upon this difference would be instructive. If they were arranged according to the closeness with which they approximate to one or other of these two extremes, it would be found that they were spread along a line stretching from property which is obviously the payment for, and condition of, personal services, to property which is merely a right to payment from the services rendered by others, in fact a private tax. The rough order which would emerge, if all details and qualification were omitted, might be something as follows:

1. Property in payments made for personal services.
2. Property in personal possessions necessary to health and comfort.
3. Property in land and tools used by their owners.
4. Property in copyright and patent rights owned by authors and inventors.
5. Property in pure interest, including much agricultural rent.
6. Property in profits of luck and good fortune: "quasi-rents."
7. Property in monopoly profits.
8. Property in urban ground rents.
9. Property in royalties.

The first four kinds of property obviously accompany, and in some sense condition, the performance of work. The last four obviously do not. Pure interest has some affinities with both. It represents a necessary economic cost, the equivalent of which must be born, whatever the legal arrangements under which property is held, and is thus unlike the property represented by profits (other than the equivalent of salaries and payment for necessary risk), urban ground-rents and royalties. It relieves the recipient from personal services, and thus resembles them.

[4.] The crucial question for any society is, under which each of these two broad groups of categories the greater part (measured in value) of the proprietary rights which it maintains are at any given moment to be found. If they fall in the first group creative work will be encouraged and idleness will be depressed; if they fall in the second, the result will be the reverse. The facts vary widely from age to age and from country to country. Nor have they ever been fully revealed. . . .

Hence the real analogy to many kinds of modern property is not the simple property of the small landowner or the craftsman, still less the household goods and

dear domestic amenities, which is what the word suggests to the guileless minds of clerks and shopkeepers, and which stampede them into displaying the ferocity of terrified sheep when the cry is raised that "Property" is threatened. It is the feudal dues which robbed the French peasant of part of his produce till the Revolution abolished them. How do royalties differ from *quintaines* and *lods et ventes?* They are similar in their origin and similar in being a tax levied on each increment of wealth which labor produces. How do urban ground-rents differ from the payments which were made to English sinecurists before the Reform Bill of 1832? They are equally tribute paid by those who work to those who do not. If the monopoly profits of the owner of *banalités*, whose tenant must grind corn at his mill and make wine at his press, were an intolerable oppression, what is the sanctity attaching to the monopoly profits of the capitalists, who, as the Report of the Government Committee on trusts tells us, "in soap, tobacco, wall-paper, salt, cement and in the textile trades . . . are in a position to control output and prices" or, in other words, can compel the consumer to buy from them, at the figure they fix, on pain of not buying at all?

All these rights — royalties, ground-rents, monopoly profits — are "Property." . . .

[5.] So the justification of private property traditional in England, which saw in it the security that each man would enjoy the fruits of his own labor, though largely applicable to the age in which it was formulated, has undergone the fate of most political theories. It has been refuted not by the doctrines of rival philosophers, but by the prosaic course of economic development. As far as the mass of mankind are concerned, the need which private property other than personal possessions does still often satisfy, though imperfectly and precariously, is the

need for *security*. To the small investors, who are the majority of property-owners, though owning only an insignificant fraction of the property in existence, its meaning is simple. It is not wealth or power, or even leisure from work. It is safety. They work hard. They save a little money for old age, or for sickness, or for their children. They invest it, and the interest stands between them and all that they dread most. Their savings are of convenience to industry, the income from them is convenient to themselves. "Why," they ask, "should we not reap in old age the advantage of energy and thrift in youth?" . . .

This need for security is fundamental, and almost the gravest indictment of our civilization is that the mass of mankind are without it. Property is one way of organizing it. It is quite comprehensible therefore, that the instrument should be confused with the end, and that any proposal to modify it should create dismay. In fact, however, property is not the only method of assuring the future, nor, when it is the way selected, is security dependent upon the maintenance of all the rights which are at present normally involved in ownership. In so far as its psychological foundation is the necessity for securing an income which is stable and certain, which is forthcoming when its recipient cannot work, and which can be used to provide for those who cannot provide for themselves, what is really demanded is not the command over the fluctuating proceeds of some particular undertaking, which accompanies the ownership of capital, but the *security which is offered by an annuity*. Property is the instrument, security is the object, and when some alternative way is forthcoming of providing the latter, it does not appear in practice that any loss of confidence, or freedom or independence is caused by the absence of the former.

Hence not only the manual workers, who since the rise of capitalism, have rarely in England been able to accu-

mulate property sufficient to act as a guarantee of income when their period of active earning is past, but also the middle and professional classes, increasingly seek security to-day, not in investment, but in insurance against sickness and death, in the purchase of annuities, or in what is in effect the same thing, the accumulation of part of their salary towards a pension which is paid when their salary ceases. It is still only in comparatively few cases that this type of provision is made; almost all wage-earners outside government employment, and many in it, as well as large numbers of professional men, have nothing to fall back upon in sickness or old age. But that does not alter the fact that, when it is made, it meets the need for security, which, apart, of course, from personal possessions and household furniture, is the principal meaning of property to by far the largest element in the population, and that it meets it more completely and certainly than property itself.

[6.] Nor, indeed, even when property is the instrument used to provide for the future, is such provision dependent upon the maintenance in its entirety of the whole body of rights which accompany ownership to-day. Property is not simple but complex. That of a man who has invested his savings as an ordinary shareholder comprises at least three rights, the right to interest, the right to profits, the right to control. In so far as what is desired is the guarantee for the maintenance of a stable income, not the acquisition of additional wealth without labor — in so far as his motive is not gain but security — the need is met by interest on capital. It has no necessary connection either with the right to residuary profits or the right to control the management of the undertaking from which the profits are derived, both of which are vested to-day in the shareholder. If all that were desired were to use property as an instrument for purchasing security, the obvious course — from the point of view of the investor

desiring to insure his future the safest course — would be to assimilate his position as far as possible to that of a debenture holder or mortgagee, who obtains the stable income which is his motive for investment, but who neither incurs the risks nor receives the profits of the speculator. To insist that the elaborate apparatus of proprietary rights which distributes dividends of thirty per cent to the shareholders in Coats, and several thousands a year to the owner of mineral royalties and groundrents, and then allows them to transmit the bulk of gains which they have not earned to descendants who in their turn will thus be relieved from the necessity of earning, must be maintained for the sake of the widow and the orphan, the vast majority of whom have neither and would gladly part with them all for a safe annuity if they had, is, to say the least of it, extravagantly *mal-à-propos*. It is like pitching a man into the water because he expresses a wish for a bath. . . .

[7.] The truth is that whereas in earlier ages the protection of property was normally the protection of *work*, the relationship between them has come in the course of the economic development of the last two centuries to be very nearly reversed. The two elements which compose civilization are active effort and passive property, the labor of human things and the tools which human beings use. The real economic cleavage is not, as is often said, between employers and employed, but between all who do constructive work, from scientist to laborer, on the one hand, and all whose main interest is the preservation of existing proprietary rights upon the other, irrespective of whether they contribute to constructive work or not.

If, therefore, under the modern conditions which have concentrated any substantial share of property in the hands of a small minority of the population, the world is to be governed for the advantages of those who *own*,

it is only incidentally and by accident that the results will be agreeable to those who *work*. . . .

Indeed, functionless property is the greatest enemy of legitimate property itself. It is the parasite which kills the organism that produced it. Bad money drives out good, and, as the history of the last two hundred years shows, when property for acquisition or power and property for service or for use jostle each other freely in the market, without restrictions such as some legal systems have imposed on alienation and inheritance, the latter tends normally to be absorbed by the former, because it has less resisting power. Thus functionless property grows, and as it grows it undermines the creative energy which produced property and which in earlier ages it protected. . . .

[8.] So those who dread these qualities, energy and thought and the creative spirit — and they are many — will not discriminate, as we have tried to discriminate, between different types and kinds of property, in order that they may preserve those which are legitimate and abolish those which are not. They will endeavor to preserve all private property, even in its most degenerate forms. And those who value those things will try to promote them by relieving property of its perversions, and thus enabling it to return to its true nature. They will not desire to establish any visionary communism, for they will realize that the free disposal of a sufficiency of personal possessions is the condition of a healthy and self-respecting life, and will seek to distribute more widely the property rights which make them to-day the privilege of a minority. But they will refuse to submit to the naïve philosophy which would treat all proprietary rights as equal in sanctity merely because they are identical in name. They will distinguish sharply between property which is used by its owner for the conduct of his profession or the upkeep of his household, and property

which is merely a claim on wealth produced by another's labor. They will insist that property is moral and healthy only when it is used as a condition not of idleness but of activity, and when it involves the discharge of definite personal obligations. They will endeavor, in short, to base it upon the principle of Function.

CHAPTER XXVII

THE SOCIAL TRUST THEORY OF PROPERTY[1]

THE NATURE OF THE RIGHT OF PRIVATE PROPERTY

A RIGHT is simply a way of acting, of developing capacities or of exercising functions, that is sanctioned by the moral sentiment of the community. The basis of all rights, therefore, including that of private property, is found in the constraining sense of well-being that is common to all the members of the group among whom the right is exercised. The distinction of "mine" and "thine" depends not so much upon occupation as upon a feeling of common interest that is furthered and made articulate by this distinction. The idea of property in so far as it has any ethical element, therefore, and is not measured in terms of the good old rule that he shall take who has the power and he shall keep who can, presupposes this feeling of common interest. Society assures to each of its members in the right of private property the power to secure and exercise the means necessary for the expansion of personality and the development of capacity as moral creatures. The general will that provides the sanction for the right must also determine the scope and purpose of the right. It must be exercised in the interest of the social good.

[1] [By JOHN MOFFATT MECKLIN: born at Poplar Creek, Miss., Jan. 21, 1871; A.B. (1890), Southwestern Presbyterian University; Ph.D. (1899), University of Leipzig; ordained into Presbyterian ministry (1896); professor of philosophy, University of Pittsburg, 1913– .

His works include: "Democracy and Race Friction" (1914); "Social Ethics" (1921).

The selection above is reprinted by permission of the publishers and is from "An Introduction to Social Ethics" (New York: Harcourt, Brace & Howe, 1921), pages 302–321 (parts omitted).]

The fact that property is primarily a social trust conditions fundamentally the ethical implications of property. For to exercise the right of property as a social trust forces the individual to reflect upon the bearing of its exercise upon the welfare of the community as a whole. There arises a constant need for correlating the laws that govern the right of property and the human values it is designed to serve. The control of the time, the talents and the persons of others that goes with the right of property must then be exercised not from the narrow and selfish point of view of the individual's own immediate interests but with an eye to the interests of that larger social complex of which the property owner and his employees are constituent elements. It is only through a keen sensitiveness to the social values always associated with the right of property that the institution can ever play the rôle it should play as society's chosen instrument for the discipline and development of character.

The institution of private property must be emancipated from the moribund legal abstractions of the eighteenth century. It must cease to be a dead juridical entity and serve the needs of a progressive society, and that without surrendering its economic or ethical value. It is doubtless true that much of the opposition to the institution of private property in the past and much of the criticism of the present rest upon outworn ideas of its character. There is no surer way in which to discredit private property than to seek its justification in eighteenth century philosophy or even in the arbitrary deliverances of courts and the rubrics of the law. These are only of value in so far as they enjoy the moral sanction of the community. Where laws, whether dealing with property or otherwise, do not have this sanction of the enlightened conscience of the community, they are already in process of abrogation. The radical easily finds support for his attack upon the right of private property in the gap that

has arisen between the institution as it actually exists and the demands of the enlightened social conscience as to what it should be. To widen that gap or to refuse to bridge it is to play into the hands of the radical. . . .

PRIVATE PROPERTY AS A NATURAL RIGHT

The doctrine of private property as a natural right has found its way directly or indirectly into almost every bill of rights and state constitution of the nation, thanks to the prevalent political philosophy of a century and more ago.

The doctrine of natural rights has exercised a profound influence upon our conceptions of private property. In its most modern form it insists that property is indispensable to man's individual development and attainment of liberty. Without the dominion over things he is a slave. It is in the free creative expression of his powers that man achieves personality and freedom. Property is but the external form of this inherent and necessary law of human nature. Hence property is a natural right independent of the laws and institutions of men. This same hoary doctrine of natural rights underlies much of the thinking of to-day. . . .

PRIVATE PROPERTY AND THE CONSTITUTION

While the doctrine of property as a natural right is not distinctly enunciated in the Constitution yet, as Professor Beard has shown, that famous historical instrument is to all intents and purposes an economic document. It was economic not in the sense of aiming primarily at the protection of property interests, but because the men who formulated its principles, especially Madison and Hamilton, realized that only through the support of the property interests could national unity be attained. . . .

The conservative attitude of the property-holding group is reflected in the Fifth Amendment of the Constitution, "No person . . . shall be deprived of life, liberty, or

property, without due process of law; nor shall private property be taken for public use, without just compensation." . . .

The "almost impregnable constitutional position," which, according to President Hadley, private property has come to occupy in this country, has been strengthened by the rôle played by the courts. They are not free to interpret the rights of property in terms of a social or economic philosophy derived from the needs of the given stage of economic evolution. They must decide whether a given law affecting property rights is in harmony with the idea of property that has been laid down in the organic law of the land, namely, the Constitution. That is, they are forced to abide by a conception of private property that is derived from the prevailing philosophy of over a century ago. . . .

PRIVATE PROPERTY AND SOCIAL STRATIFICATION

The traditional ethic of private property as a right that is unalterable and inalienable and hence absolute, has implications of the utmost importance for the relations of men to each other in our complicated modern industrial order. In every office, shop, store or mill we see certain individuals giving orders and others obeying these orders. If we ask ourselves what is the basis of this authority by which one man or a group of men dispose of the time, physical and mental energy of thousands of their fellowmen almost at will, we can hardly say that the law compels this obedience. They are not beasts of burden nor human chattels; legally they are the free citizens of a democracy. Wherein, then, does this authority lie? The seat of this authority is undoubtedly to be found in the right of private property. The state gives to the owner of property power over the lives and activities of his fellows, not in order that they may be selfishly and injuriously exploited but on the supposition that in the

long run this is the best way in which to develop natural resources, create economic goods, provide employment for men and further the welfare of society. That is, this power over others by virtue of the possession of property is a social trust and is safeguarded only on the supposition that it is exercised as such.

Unfortunately the doctrine of property as an absolute right does not conduce to the social exercise of the vast power it gives. Where this sense of social responsibility is lacking the results are often unfortunate. . . .

TENDENCY TO IDENTIFY PROPERTY WITH OWNERSHIP

As a result of its highly institutionalized position in American life, property has tended to become a static rather than a dynamic thing. Property exists to be owned; its significance is largely exhausted in the relation of ownership. It seldom occurs to the man on the street that a piece of valuable unimproved property in the heart of the city is any less property because it serves no creative purpose. Its status as property is fixed by the legal relation it sustains to some owner, not in the extent to which it liberates human activities or enriches the community life. Even institutions such as churches and universities, dealing with the intangible intellectual and spiritual values, must be owned by trustees before they can have institutional reality. Ownership is the measure of existence.

The idea of ownership as constituting the essence of property may be pushed to such an extreme that it becomes downright anti-social in spirit and intent. Property is that which is essentially private. It is my own just to the extent to which I succeed in keeping its use from being shared by others. This is the implication of the sign one often meets on unoccupied and unimproved property, "Private property, no thoroughfare." This thrusts into one's face, as the very essence of the right of

private property, that it is exclusive, selfish, and antagonistic to all that is social or shared in common. It is this narrow spirit that stirs the opponent of private property and makes him see in it the avowed enemy of the community. . . .

INSTRUMENTALITIES FOR SOCIALIZING PRIVATE PROPERTY

The method of procedure of the acquisitive instinct underlying ownership is entirey logical, though it may seem harsh, materialistic and blind to the other nobler creative impulses of the human heart. It seeks to acquire what is its due and to retain what is not its due, for the principle of acquisition works in one direction only. To yield to the demands of social justice or to gratify the more socially valuable creative impulses would decrease owning power. In this ethic whatever makes for possession is good and whatever militates against possession is evil. There are no sentimental illusions, no waste of time and energy, no idealistic dreams. If we quarrel with such an ethic, we should remember that it is not inherent in the nature of the institution of private property which is intrinsically neither good nor bad. Our quarrel should be with the social situation, the traditions and habits of thought that make such an ethic of property possible. The problem is really one of creating a new social conscience inspired by a deeper insight into the meaning of property itself, a conscience which realizes that private property is a social trust. The question arises, how is this to be done without a radical departure from American traditions? To this query the natural reply is that we have a remedy ready at hand, namely, Taxation.

The ethical justification of taxation lies in the fact society realizes that all the social instrumentalities for progress, such as health regulations, welfare bureaus, scientific school systems, are most important factors in the creation of the wealth of the community. . . .

If we take the broad social point of view as to the origin and nature of property suggested by the ethics of taxation, we must question the absolute right of private property as over against the rights of the community. These rights, together with all others, originate in the state, and to the state and community they must look for their sanction. The community with its vast complex of institutions provides the individual with many varied instrumentalities for the development of his powers, one among them being the right of private property. Because the community makes possible these forms of individual achievement, it demands the right to regulate the affairs of the individual in the prosecution of his ends. It can determine the methods by which wealth is accumulated and it can also direct how that wealth shall be expended where such expenditure is of vital concern for the welfare of the community.

There is another striking illustration of the social nature of property in the right of eminent domain. This has been defined by the Supreme Court as "the ultimate right of the sovereign power to appropriate, not only the public property, but the private property of all citizens within the territorial sovereignty, to public uses." [1] This fundamental right of society in the land is probably to be traced back to an earlier undifferentiated stage when all land was held in common. We have no reason to believe that this right has been repudiated or could be neglected by society without endangering its vital interests. This fact has also been cogently stated by another judge of the Supreme Court. "No society has ever admitted that it could not sacrifice individual welfare to its own existence. If conscripts are necessary for its army, it seizes them, and marches them, with bayonets in their rear, to death. It runs highways and railways through old family places in spite of the owner's protest, paying in this instance the

[1] *Charles River Bridge v. Warren Bridge*, 11 Peters 420 (1837).

market value, to be sure, because no civilized government sacrifices the individual more than it can help, but still sacrifices his will and his welfare to that of the rest." [1]

Perhaps the best illustration of the social character of property is to be found in the attempts to regulate property rights through an appeal to the police power. This vague term means primarily the right of the community to secure order, suppress crime and violence, and protect life and property. This cruder and more obvious sense was gradually expanded so that the police power now includes not only the right of the state to prevent crime and violence but also the right to take the more positive measures that have to do with the health, happiness, economic welfare, and enlightenment of its citizens. In some states, as in modern Germany, the police power has absorbed almost the entire life of the community, political, economic, and even cultural. That this power is of recognized importance even in our individualistic social order has been recognized by the courts. In the famous Slaughter House Cases (1872), the Supreme Court made the following deliverance: "The power (police power) is, and must be, from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of the social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property."

It would appear, then, that the use of the police power in the regulation of property rights is nothing more nor less than a concrete application of a principle fundamental to the spirit of American law. This principle is that all property is acquired, and the right to its enjoyment and use is guaranteed, on the assumption that this right conduces to the general welfare of the community and does not injure or invalidate the rights of others. . . .

[1] Holmes, "The Common Law," p. 43.

It is possible, then, to define the police power with reference to property rights as the power of the lawmakers, and ultimately of the courts as the interpreters of the law, to define and restrict the right of property from time to time as it may become necessary to meet the needs of an ever changing social order. . . .

When we push our analysis beyond the rather vague term, police power, which in reality the courts have never succeeded in defining and from the nature of the principle itself can never place in the logical straitjacket of a final definition, we get into a sphere where social psychology and social ethics must come to our aid. We discover that in its last analysis the police power draws its strength and divines its purpose from that fundamental organization of the sentiments of the community that we have labeled the social conscience. This is intimated by one of the most socially minded members of the supreme bench, Mr. Justice Holmes, as follows: "The police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or the strong and preponderant opinion to be greatly and immediately necessary to the public welfare." [1] This is a clear recognition of the rôle of the social conscience in directing the police power and providing it with an ultimate sanction. It is to this court of last appeal in the enlightened sentiments of a free people, sentiments, to be sure, that change from age to age with the shifting stresses and strains of the social order, that we must look for the determination of the right of private property. If the time should ever come when the prevailing sentiments of the community demand the abolition of private property, a contingency that is exceedingly remote, the lawmakers and the courts would be duty bound to give rational expression to this fact in the laws of the land. . . .

[1] 219 U. S., 110 (1911), p. 111.

CHAPTER XXVIII

CRITICISM OF THE SOCIAL TRUST THEORY OF PROPERTY FROM A SOCIALIST POINT OF VIEW [1]

Now the Human Law of Distribution, in its application to industry, aims, as we have seen, to distribute Wealth, in relation to its production on the one hand and its consumption on the other, so as to secure the minimum of Human Costs and the maximum of Human Utility. No bare rule of absolute equality, based upon the doctrine of equal rights, equal powers or equal needs, will conduce to this result. The notion that the claims of justice or humanity would be met by requiring from all persons an *equal* contribution to the general output of productive energy is manifestly foolish and impracticable. To require the same output of energy from a strong as from a weak man, from an old as from a young, from a woman as from a man, to ignore those actual differences of age, sex, health, strength and skill, would be rejected at once as a preposterous application of human equality. Alike, as regards labor and capital, the true social economy is

[1] [By JOHN ATKINSON HOBSON: born at Derby, England, July 6, 1858; classical master (1880–87) at Faversham and Exeter.

His works include: "The Physiology of Industry" (1889); "Problems of Poverty" (1891); "The Evolution of Modern Capitalism" (1894); "The Problem of the Unemployed" (1896); "The Economics of Distribution" (1900); "The Social Problem" (1901); "The Industrial System, (1909); "Gold, Prices, and Wages" (1913); "Work and Wealth" (1914); "Taxation in the New State" (1919); "Problems of a New World" (1921).

The selection above reprinted is from his "Work and Wealth" (New York: The Macmillan Co., 1914), pages 163–170, 283–84, 290–300 (parts omitted).]

expressed in the principle that each should contribute *in accordance with his ability.*

It should be similarly evident that exact *equality of incomes* in money or in goods for all persons is not less wasteful, or less socially injurious. I cannot profess to understand by what reasoning some so-called Socialists defend an ideal order in which every member of society, man, woman and child, should have an absolutely equal share of the general income. The needs of people, their capacity to get utility out of incomes by consuming it, are no more equal than their powers of production. Neither in respect of food, or clothing, or the general material standard of comfort, can any such equality of needs be alleged. To say that a big strong man, giving out a correspondingly large output of energy, needs exactly the same supply of food as a small weakly man, whose output is a third as great, would be as ridiculous as to pretend that a fifty-horse power engine needed no more fuel than a ten-horse power one. Nor will the differences in one set of needs be closely compensated in another. Mankind is not equal in the sense that all persons have the same number of faculties developed, or capable of development, to the same extent, and demanding the same aggregate amount of nutriment. To maintain certain orders of productive efficiency will demand a much larger consumption than to maintain others. Equality of opportunity involves the distribution of income according to *capacity to use it*, and to assume an absolute equality of such capacity is absurd.

It may no doubt be urged that it is difficult to measure individual needs and capacities so as to apply the true organic mode of distribution. This is true and any practical rules for adjusting income, or for distribution of the product, according to needs, will be likely to involve some waste. But that is no reason for adopting a principle of distribution which must involve great waste. However

difficult it may be to discover and estimate differences of needs in individuals or classes of men, to ignore all differences insures a maximum of waste. . . .

Distribution of income according to needs, or ability to use it, does not, indeed, depend for its practical validity upon the application of *exact and direct measurements* of needs. The limits of any sort of direct measurement even of material needs appear in any discussion of the science of dietetics. But inexact though such science is, it can furnish certain valid reasons for different standards of food in different occupations, and for other discriminations relating to race, age, sex and vigor. . . .

The organic law of distribution in regarding needs will, therefore, take as full an account as it can both of the *unity* and the *diversity* of human nature. The recognition of "common" humanity will carry an adequate provision of food, shelter, health, education and other prime necessaries of life, so as to yield equal satisfaction of such requirements to all members of the community. This minimum standard of life will be substantially the same for all adult persons, and for all families of equal size and age. Upon this standard of human uniformity will be erected certain differences of distribution, adjusted to the specific needs of any class or group whose work or physical conditions marks it out as different from others. The present inequalities of income, so largely based upon conventional or traditional claims, would find little or no support under this application of the organic law. Indeed, it seems unlikely that any specific requirements of industrial or professional life would bulk so largely in interpreting human needs as to warrant any wide discrimination of incomes. There seems no reason to maintain that a lawyer's or a doctor's family would require, or could advantageously spend, a larger income than a bricklayer's, in a society where equality of educational and other opportunities obtained. But, if there were any

sorts of work which, by reason of the special calls they made upon human faculties, or of the special conditions they imposed, required an expenditure out of the common, the organic law of distribution according to needs would make provision for the same as an addition to the standard minimum. . . .

Thus we see this law of distribution, operative as a purely physical economy in the apportionment of energy for mechanical work, operative as a biological economy through the whole range of organic life, is strictly applicable as a principle of social economy. Its proper application to social industry would enable that system to function economically, so as to produce the maximum of human utility with the minimum of human cost.

If we can get an industrial order, in which every person is *induced to discover and apply to the service of society* his best abilities of body and mind, while he receives from society what is required to sustain and to develop those abilities, and so to live the best and fullest life of which he is capable, we have evidently reached a formally sound solution of the social problem on its economic side. We are now in a position to approach the actual processes of economic distribution that prevail to-day, so as to consider how far they conform to this sound principle of human industry. . . .

INDIVIDUAL MOTIVES TO SOCIAL SERVICE

Our examination of the existing industrial system discloses certain discords of interest and desire between the owners of the several factors of production, on the one hand, between producers and consumers on the other. Among the owners of factors of production the sharpest antagonisms are those between the capitalist employer and the wage-earner, and between the landowner and the owners of all other factors. Except as regards the ownership of land, these antagonisms are not absolute but qualified.

The interests of capital and labor, of producer and consumer, march together up to a certain point. There they diverge. These discords of interest materialize in what we term "the surplus," that portion of the product which, though not essential to the performance of the economic process, passes to capital, labor or the consumer, according to the economic strength which natural or artificial conditions assign to each. The humanization and rationalization of industry depend, as we recognize, upon reforming the structure of businesses and industries, so as to resolve these discords, to evoke the most effective coöperation in fact and will, between the several parties, and to distribute the whole product, costs and surplus, among them upon terms which secure for it the largest aggregate utility in consumption. The operation of industry upon this truly and consciously coöperative basis, would, it is contended, evoke increased productive powers, by bringing into play those instincts of mutual aid that are largely inhibited by present methods, and by distributing the increased product so as to evoke the highest personal efficiency of life and character.

But it would be foolish to ignore the doubts and objections which are raised against the spiritual assumption upon which this ideal of human industry is based. It is often urged that man is by nature so strongly endowed with selfish and combative feelings, so feebly with social and coöperative, that *he will not work efficiently* under the reformed economic structures that are proposed. He must be allowed free scope to play for his own hand, to exercise his fighting instincts, to triumph over his competitors, and to appropriate the prizes of hazard and adventure, the spoils attesting personal force and prowess, or else he will withhold the finest and most useful modes of his economic energy.

The distinctively spiritual issue thus raised is exceedingly momentous. Suppose that the business life can be

set upon what appears to be a sound and equitable basis, is human nature capable of responding satisfactorily to such an environment? Putting it more concretely, are the actual powers of human sympathy and coöperation capable of being organized into an effective social will?

This issue is seen to underlie all the doubts and difficulties that beset the proposals to apply our organic Law of Distribution for purposes of practical reform. All proposals by organized public effort to abolish destitution give rise to fears lest by so doing we should sap the incentives to personal effort, and so impair the character of the poor. Among such critics there is entertained no corresponding hope or conviction that such a policy may, by the better and securer conditions of life and employment it affords, sow the seeds of civic feeling and of social solidarity among large sections of our population whose life hitherto had been little else than a sordid and unmeaning struggle. Proposals to secure for public use by process of taxation larger shares of surplus wealth are met by similar apprehensions lest such encroachments upon private property should impair the application of high qualities of business and professional ability. The growing tendency of States and Municipalities to engage in various business operations is strongly and persistently attacked upon the ground that sufficient public spirit cannot be evoked to secure the able, honest management and efficient working of such public concerns. . . .

To such criticism two replies are possible, each valid within its limits. The first consists in showing that the existing business arrangements are extremely ill-adapted for offering the best and most economically effective stimuli to individual productivity. . . .

The true answer to these questions is not difficult to find. We have sketched a growing order, harmony and unity, of industrial life, concerned with the regular supply of economic needs for mankind. Were such an order

effectively achieved, in accordance with the rational and equitable application of our human law of distribution, the economy of industrial processes would be accompanied by a corresponding economy of thought and emotion among the human beings engaged in this common co-operation. This social economy demands, as we have seen, the substitution of *social welfare for private profit as the directing motive* throughout industry. . . .

For to this vital point we must return. The substitution of direct social control for the private profit-seeking *motive* in the normal processes of our industries is essential to any sound scheme of social reconstruction. The struggle to keep or to improve one's hold upon some place in the industrial system, to win a livelihood, to make some gain that involves a loss to someone else, derationalizes the intelligence and demoralizes the character of all of us.

This derationalization and demoralization are seen to be rooted in the defective structure and working of industrialism itself.

If Industry were fairly apportioned among all, according to the capability of each, if Property were allotted to each according to his needs, by some natural process of distribution as regular and certain as the process of the planets, persons would not need to think or feel very keenly about such things as Industry and Property: their intellects and hearts would be free for other interests and activities.

But the insecurity, irregularity and injustice of economic distribution keep Industry and Property continually in the foreground of the personal consciousness.

Here comes into terrible relief the moral significance of the unearned Surplus — the term which gathers all the bad origins of Property into the focus of a single concept.

At present much Industry is conducted, much Property is acquired, by modes which are unjust, irrational and socially injurious. Legal privilege, economic force,

natural or contrived scarcity, luck, personal favor, inheritance — such are the means by which large quantities of property come to be possessed by persons who have not contributed any considerable productive effort to their making.

Such property stands in the eye of the law, and in the popular regard, upon precisely the same footing as that owned by those who have earned it by the sweat of their brow, or the effort of their brain. . . .

The crucial moral fallacy which it evokes is the contention, seriously put forth by certain social philosophers, as well as by social reformers, that property acquired in the ways I have just indicated is validated in reason and morality by the good uses to which it may be put by its owners. Mr. Carnegie and Mr. Rockefeller have seriously propounded the theory that certain individuals are endowed by nature or by circumstances with the opportunity and power of accumulating great wealth, but that their wealth, though legally their private property, is rightly to be regarded by them as a "*social trust*" to be administered by them for the benefit of their fellow-men. It seems to them a matter of indifference that this wealth is "unearned," provided that it is productively expended. . . .

The radical defect of this doctrine and practice of the "social trust" is its false severance of origin from use. The organic law of industry has joined origin and use, work and wealth, production and consumption. It affirms a natural and necessary relation between getting and spending. A man who puts no effort into getting a rent-receiver, cannot put well-directed effort into spending. He is by natural proclivity a wastrel. A man who is purely selfish in his getting, as the sweater, gambler, or monopolist, cannot be social in his spending. The recipient of unearned income is impelled by the conditions of his being to a life of idleness and luxury: this is the life

he is fitted for. He is unfitted for the administration of a social trust.

These obvious truths, so fatally neglected, are no vague maxims of revolutionary ethics, but are firmly rooted in physical and moral fact. We have seen that there is throughout organic life a quantitative and a qualitative relation between function and nutrition, each being the condition of the other. He who does not eat cannot work: he who does not work cannot eat. Though abnormal instances may seem, here as elsewhere, to contravene the natural law, it remains true that the power of individual earning, not merely involves no power of social spending, but negates that power. It might even be contended that there will be a natural disposition in the recipient of unearned wealth to spend that wealth in precisely those ways in which it injures most the society he seeks to serve. This is probably the case. It is more socially injurious for the millionaire to spend his surplus wealth in charity than in luxury. For by spending it on luxury, he chiefly injures himself and his immediate circle, but by spending it in charity he inflicts a graver injury upon society. For every act of charity, applied to heal suffering arising from defective arrangements of society, serves to weaken the personal springs of social reform, alike by the "miraculous" relief it brings to the individual "case" that is relieved, and by the softening influence it exercises on the hearts and heads of those who witness it. It substitutes the idea and the desire of individual reform for those of social reform, and so weakens the capacity for collective self-help in society. The most striking testimony to the justice of this analysis is furnished by the tendency of "model millionaires" to direct all their charity to wholesale and what *they* deem social purposes, rather than to individual cases. . . .

The clear recognition of these truths is closely germane to our central consideration in this chapter, viz., the

question whether there can be evoked in the common consciousness a flow of true social or coöperative feeling strong and steady enough to *evoke from individual citizens a sufficient voluntary efficiency in production.*

No absolutely convincing answer to the question is at present possible. But, if any such experiment is to be tried hopefully, it can only be done by setting Property upon an intelligible moral and social basis, so that it passes into the possession of him to whom it is really "proper," in the sense that he has put something of himself into its making. Only by resolving unearned into earned income, so that all Property is duly earned either by individuals or by societies, can an ethical basis be laid for social industry. So long as property appears to come miraculously or capriciously, irrespective of efforts or requirements, and so long as it is withheld as irrationally, it is idle to preach "the dignity of labor" or to inculcate sentiments of individual self-help.

When all Property is visibly justified, alike in origin and use, the rights of property will for the first time be respected, for they will be for the first time respectable. To steal, to cheat, to sweat, to cadge or beg, will be considered shameful, not because the law forbids, but because such acts will be felt by all to be assaults upon the personality of another. For the first time in history, also, the tax-dodger, the contractor who puts up his price for public works, the sinecurist, the jobber, the protectionist and other parasites upon the public purse, will receive the general reprobation due to robbery. For when the State is recognized as having rights of property identical in origin and use with those of individual citizens, that property will claim and may receive a similar respect. Property, in a word, becomes a really sacred institution when the human law of distribution is applied to the whole income, surplus as well as costs. Such inequalities in income as survive will be plainly justified as the counter-

part of inequality of efforts and of needs. The wide contrasts of rich and poor, of luxury and penury, of idleness and toil, will no longer stagger the reason and offend the heart.

So the standard of sentimental values which affects the conventional modes of living of all classes — largely by snobbish imitation and rivalry — will be transformed.

Ostentatious waste and conspicuous leisure, with all their injurious reactions upon our Education, Recreation, Morals, and Æsthetics, will tend to disappear. The illusory factor of Prestige will be undermined, so that the valuations, both of productive activities and of consumption, will shift towards a natural, or rational, standard.

TITLE II E: REVIEW OF MODERN TRENDS

CHAPTER XXIX

PRIVATE PROPERTY AS A NECESSARY ACCOMPANIMENT OF SUCCESSFUL COLLECTIVISM [1]

[1.] While perhaps no two contemporary writers who advocate Socialism or some other species of Collectivism have precisely the same conception of the status of property in the better order which they believe is approaching, the majority of them would probably agree that all, or most, forms of property employed in production are to be owned and operated by "society" or "the people" collectively and not distributively and individually. It is safe to say that not only practically all socialists but also most other prophets of a juster and fairer social order agree that the extensive substitution of collective for individual ownership of property used in production is one of the most fundamental tenets of their faith.

[2.] All such reformers, no doubt, would concede that collectively owned property must ever be thriftily man-

[1] [By William K. Wright, Ph.D., University of Chicago; instructor in philosophy, Cornell University, 1913–16; assistant professor of philosophy, Dartmouth College, since 1916.

His works include: "The Ethical Significance of Feeling, Pleasure, and Happiness" (Philosophic Studies of the University of Chicago); "A Student's Philosophy of Religion" (Macmillan, 1922); "The Psychology of Punitive Justice" (Philosophical Review, 1908); "Evolution of Values from Instincts" (idem 1915); "Ethical Aspects of Internationalism" (International Journal of Ethics, 1918).

The selection above reprinted is from his essay entitled "Private Property and Social Justice" (International Journal of Ethics, July, 1915), pages 498–513 (parts omitted).]

aged and be made to increase in bulk from one generation to another, so that progress may continue and humanity go forward. Indeed, the total amount of wealth now in existence must be very greatly increased before the condition of the rank and file of humanity could, even under any form of collectivism, be greatly improved. For even in this, perhaps the richest country in the world, the per capita wealth is pitifully small.[1] If there were collective ownership of all property to-day and absolute equality of opportunity, this would only mean collective poverty for all alike. So in order to make collectivistic ideals realizable at all the total amount of wealth, whether in the form of publicly or privately owned property, must be increased many fold.[2] Society, all must admit, ought in its collective capacity to possess the virtues of the thrifty bourgeois class, and be a successful accumulator of property. Now if society is to become economical and productive in its collective capacity, the individuals of which society is composed must be economical in their private capacities as individuals. A thrifty society made up of individual spendthrifts could no more exist than could a just and benevolent society composed of individuals who are selfish and dishonest in their private relations.

[3.] In order, however, that a society might count upon its individual citizens being thrifty in their private capacities as individuals, it would always have to permit and foster to some extent individual ownership of private property. Individual citizens would need to have formed the habit of saving and investing a portion of their incomes, and to have felt the joy that comes from experiencing one's savings yield an increment, whether of profit,

[1] Fifteen hundred dollars is the highest estimate I remember having seen. *Cf.* Spahr, "The Present Distribution of Wealth in the United States" and F. H. Streightoff, "Distribution of Income in the United States." While written for a different object, these treatises chiefly impress one with the smallness of the total amount of wealth and income possible of distribution.

[2] This holds, even if population were to remain stationary, and *a fortiori*, if it continues to increase.

interest, or rent. We cannot hope that the property owned by a society collectively (if the society were democratically organized) would be managed economically and rendered productive unless the individual citizens had learned to be thrifty and productive in the management of private property. It would not be enough to allow each individual citizen the privileges of private property in his hat and shoes and the furnishings of his apartments. Nor would it suffice, as Mr. H. G. Wells has suggested,[1] to leave little else than the more highly speculative fields to private investment. For if that were done, since individuals in their private capacities had chiefly learned to use capital in speculation, the collectively owned property would also inevitably be handled recklessly, and much of it wasted. If a society is to be thrifty and productive in the management of publicly owned property, its individual citizens would have to be permitted privately to own income-producing capital, and to learn to increase it through their personal care, prudence, and conservative risk.

Whatever our theory of a social mind or social will, we cannot expect that society collectively organized can possess any virtue which a considerable number of its individual citizens do not possess in their private capacities. And individual citizens cannot possess the virtue of economy unless they have the opportunity to acquire it. This contention will, I believe, be confirmed by a consideration of the conditions under which publicly owned property is managed successfully to-day. Germany and Switzerland are constantly cited by collectivists as countries where large productive enterprises are publicly owned and successfully managed. But in both countries the government is in the control of the property-owning

[1] "New Worlds for Old," Chap. VII. Mr. Wells is extremely indefinite. He recognizes that *some* property should be left to private ownership, but he is guided by no psychological principle such as that advanced in this paper, and is inclined to assign the speculative fields to private ownership.

classes: in Germany because of the peculiar electoral system, and for other reasons, in Switzerland because of the very general ownership of private property. On the other hand, in American cities, where the majority of voters are not property holders and taxpayers, publicly owned property is as a rule sadly wasted and mismanaged.

[4.] Before proceeding to develop the consequences of the position at which we have now arrived, it will be necessary to forestall a variety of objections all of which arise out of a misunderstanding of the relation of the laws of imitation and suggestion to the more basic springs of human action. For instance, an objector might say: "Your argument assumes that an individual must exercise a virtue in a private capacity if he is to exercise it in a public capacity, that he must be personally thrifty in order to appreciate and exercise public thrift. But this is not necessarily the case, for some bank cashiers are economical in the management of the funds of their banks and careless in their private expenses, and some physicians are careful of the health of their patients and careless of their own." Now I am quite willing to admit that a few such bank cashiers and physicians exist. The reason is, that through imitation and suggestion individuals occasionally display the outward manifestations of a virtue or other mental trait before the public, while the virtue really forms no integral part of their characters and does not govern their private conduct. The standards of their colleagues have been adopted by such men through imitation and suggestion and in conformity to the requirements of their employers and patrons (stockholders and depositors and patients) who really do in some measure possess the virtues concerned. If nobody were thrifty there would be no demand for banks; if nobody cared for his health, there would be no call for physicians. Such exceptional instances as this objection advances can only exist because they are exceptions. . . .

A somewhat similar objection is, that in our modern society persons are led to accumulate property by a great many other causes besides what I have called the virtue of economy. Very much accumulation is due to the desire for self-display, to exercise "the will for power," to be esteemed successful; and, indeed, much accumulation is due simply to the sheer inertia and incapacity of many of the very wealthy to spend all of their huge incomes, which in consequence automatically increase already swollen fortunes.[1] In reply to this, I would say, first, that if all property were publicly owned all of these causes (except possibly the last) mentioned in the objection would cease to operate. Private property must exist to call these motives into operation, and without its existence they would disappear. And, furthermore, it seems to me that these inducements alone would be insufficient, even in the present capitalistic order, to bring very much new wealth into existence. Persons who accumulate property for these reasons do so in more or less direct imitation of those who are thrifty. The tendency to accumulate property begins with persons whose strong acquisitive instincts have crystallized into a sentiment or virtue of economy, and only later is the tendency propagated to other persons who are economical in some phases of their conduct and not in others and who do not directly appreciate the virtue itself.

It must be remembered that imitation and suggestion are never ultimate explanations of social phenomena. They are only the modes in which mental traits possessed by some persons in a marked degree become propagated to others who are naturally less susceptible to them. We have national panics and epidemics of rage only because of the existence of individuals who possess the instincts of fear and anger in aggravated form, and because of the law that such panics and rages can be propagated from

[1] Cf. J. A. Hobson, "Work and Wealth," chap. VIII.

them to others. This sort of contagion is always very unstable in its influence and duration. No secure foundation for national thrift in the conservation of public wealth could be furnished by imitation and suggestion, or collective inertia in the expenditure of a large public income. The majority of citizens must really possess the virtue of economy as an integral part of their characters if the society of which they are members is to be economical.

[5.] There are only two ways in which it would be psychologically possible for society to hope to manage large amounts of publicly owned property with marked success. The first and simplest would be to restrict the political power to those who are now property holders and so have demonstrated that they possess the virtue of economy. Plutocratic socialisms have existed in the past and have been successful in maintaining themselves and promoting the welfare of the ruling class. Evidently, however, a socialism of this sort is desired by no one to-day, at least in America.

The other way would be more difficult, but I believe ultimately feasible. It would be to enable all individual adult citizens to become owners of private property.

A detailed exposition of the various ways and means by which this latter plan might be effected belongs to another province than that of the philosophical student. It is necessary, however, to touch briefly upon this side of the matter in order to make it clear that what I am advocating lies within the range of practical possibilities. It is really much more practical and less utopian than most radical programs. In the first place, if workers are to be enabled to become small capitalists, their wages must become large enough so that a margin will exist between the expenditures necessary to maintain a reasonable standard of living and their total incomes. Their standard of living, of course, must not be lowered. In the second place, inducements must be offered working-

men to save and to invest this margin. Most immigrants to the United States possess the virtue of thrift upon their arrival, and if safe investments were made accessible to them it would be easy to induce them to save and to invest and so to become small capitalists.

What I am urging is not only entirely in harmony with many of the collectivistic proposals urged by socialists and progressives at the present time, but indicates a way by which such reforms could be made to appear more practicable. By all means let us insure workers against sickness, accident, unemployment, old age, and death. It is now objected that such insurance projects are undesirable; first, because they would remove the chief incentives to industry and economy; secondly, because they are too costly and would necessitate excessive burdens of taxation. But if the opportunity to make safe investments yielding fair interest is offered to workingmen, they will receive a new and substantial inducement to become industrious and economical, and the first objection will no longer hold. Under these circumstances workingmen will learn to regard their labor as an insurable form of productive capital, and acquire increased confidence and self-respect. Fire insurance increases rather than diminishes the thrift of small property holders; labor insurance of laborers who are small capitalists will have a similar effect. The second objection also will no longer hold. For, with a larger proportion of the members of society saving portions of their incomes and bringing new capital into existence, more can be done in the way of social amelioration without increasing present rates of taxation; and at the same time a society composed of thrifty citizens will itself be more efficient in managing collectively owned enterprises and causing them to earn profits that would be available for such purposes.

If such a program as has been suggested were to be carried out it might even ultimately become feasible that

society should not only, as it now does, save every one from actual starvation, but also relieve every one from poverty, and provide all children with the best education suited to their talents, supporting them entirely during their schooling when necessary. Such extreme measures of social equality would appear to be psychologically feasible *after* a considerable portion of the laboring classes had once formed a taste for the accumulation of income producing capital and for the luxuries which its ownership would afford them in addition to their wages and the minimum of comfort guaranteed by society to every one. For under such conditions as I have indicated there would be the same stimulus to save and become a small capitalist that there now is to work and avoid pauperism. Indeed I am utopian enough to imagine that it might even become a slight social disgrace for an able-bodied workingman *not* to own some interest-bearing securities that he had acquired by savings from his wages!

It is therefore clear that very many of the ways in which socialists hope to benefit the lot of humanity can be ultimately attained, if, while society accumulates and operates an increased amount of productive property, individuals are induced in increasing numbers to accumulate more private wealth also. . . .

[6.] The advance of social reform, dependent as it is upon the increased accumulation of private as well as of public property, is somewhat endangered by some arguments and proposals, advanced by well meaning but not sufficiently reflective radicals. Most of the elementary textbooks in logic give as an instance of fallacious reasoning attributed to Malthus the proposal that, in view of the fact that the owners of cows are industrious, the poor could be made industrious by presenting them with cows. The fallacy, of course, is that of mistaking an effect for a cause, and supposing that thrift itself could be induced by the acquisition in some other way of the

effects of thrift. No one to-day would be guilty of this fallacy in so crude a form. But the reported hope of the Italian syndicalists that by a general strike or revolution the industries in which laborers are now employed may be made to pass into their ownership, and that thereafter the new owners of the industries will operate them economically involves the same fallacy. An inexperienced commonwealth that precipitately took over railways, mines, or factories by confiscation or expropriation, or paid for them with the proceeds of heavy taxes on inheritances or unearned increments in land would be utterly unable to operate them economically. When reformers favor the acquisition of public utilities through such procedures, and not through the discipline of earning profits by management itself, they are guilty of the fallacy of the cows in a subtler form.[1]

Other agitation that is psychologically as well as economically pernicious is the indiscriminating attack upon all forms of profit, rent, and interest as exploitation of the laboring classes. If, as I have been urging, the great desideratum is to bring more capital into existence in order that there may be more wealth to be distributed and consumed, we must not cast aspersions upon the part performed by capital in production or deny to capital its rewards. On the other hand, we should enable the laborers by their own efforts to become capitalists, so that the incomes which they now receive from their labor may be supplemented by incomes which they will receive as capitalists. In that manner present inequalities may be largely reduced, and the proportionate amount of the fruits of production now received by the working classes may be greatly increased without tampering in any way with property rights. The rights of property need to be made secure — and extended to assure security to the small

[1] Even so generally reasonable writers as Spargo and Arner ("Elements of Socialism") do not realize this. (*Cf.* ch. XXIV.)

investor — in order to afford to every adult human being the opportunity to develop his personality by becoming an owner of income-producing property.

A socialistic writer who displays keen psychological and philosophical insight is Mr. William English Walling.[1] With very many of Mr. Walling's conceptions, including his acceptance of pragmatism, the present writer finds himself in hearty concord. . . .

Perhaps another reason why Mr. Walling has not perceived the possibility of the outcome for which this paper contends is that he has not wholly assimilated one of the consequences of the pragmatism which he professes — a view, by the way, that Bergson and many idealists also hold — *viz.*, that the future is not a mere repetition of the past, but an enlargement of it in every way, and that consciousness exercises a creative function in this process of growth. Pragmatism, as well as most forms of idealism, teaches that reality is no closed or fixed system of absolute entities that cannot become enlarged both quantitatively and qualitatively; the world is rather the product of creative effort, and is largely what we make it. It seems to me that it follows from this that property, like other aspects of human personality, is not a fixed quantity. There is almost no limit to the amount of property that can be brought into existence through individual and collective efforts. In order that the present propertyless classes may be benefited it is not necessary that they should, through public expropriation of some sort, come into the possession of any property *now* owned by individuals (without fully compensating the present owners with other income-producing property). All that is necessary is that society as a whole, and the propertyless as individuals, should create *new* wealth, in addition to that now in existence, and this they can readily learn to

[1] "Socialism As It Is; The Larger Aspects of Socialism; Progressivism and After."

do under juster social arrangements. If the possible amount of wealth were a fixed quantity, the only way that the "have nots" could acquire any of it would be at the expense of the "haves." The "class war" would follow as a corollary. But full acceptance of pragmatism should lead to the recognition of still "larger aspects of socialism" than those set forth in Mr. Walling's admirable volume of that title. Pragmatism should emancipate socialists from superstitions of "class war," of "class consciousness," of capital as necessarily the fruit of exploitation, of rent, profit, and interest as necessarily immoral, and of other absolutistic conceptions that are now no longer tenable in view of the larger interpretations of reality, and the place of human personality in it.[1] . . .

[7.] Perhaps, however, some one may still object that although certain virtues attend the ownership of private property, this institution none the less tends to render men cold, hard, greedy, avaricious, and selfish, and that it is therefore, on the whole, antagonistic to the development of the larger moral life. Private ownership should therefore ultimately be abolished in favor of exclusive public ownership. This argument, which has never been more trenchantly advanced than in the Republic of Plato, has been refuted in the Politics of Aristotle. Plato, more logical than many modern detractors of property, saw that precisely the same objections apply to the monogamous family, which also appears to narrow the range of interests and sympathies of its members, and to make them hard, cold, selfish, and indifferent to the outside

[1] Mr. Walling, to be sure, seems to see this dimly. Hence his assertion that socialism is not a "class struggle," but an "anti-class struggle." ("Larger Aspects of Socialism," p. xiii.) But in the same breath he insists in italics that "*Socialism is a struggle of those who have less, against those who have more, than equal opportunity would afford,*" and the general account in "Progressivism and After" characterizes social evolution as a warfare against privileged classes, and gives the general impression that those who have less than equal opportunity are to benefit chiefly through heavy taxation of those who have more, and through the abolition of the rights of bequest and inheritance, and not through themselves learning to produce and accumulate new wealth on their own account.

world. Plato therefore, thought that the guardians, if deprived of monogamous family life, would indiscriminately love all the children of the next generation as if they were their own; and, in like manner, that, deprived of private possessions, they would disinterestedly conserve the public property as if it were their own. The spirit of Aristotle's refutation, restated in a modern psychological manner, is, that those who have no intimate personal relationship with a few children cannot acquire the parental virtues at all, and those who have no property of their own cannot acquire the virtue of economy. On the other hand, through moral education we may lead parents and others to extend to children in general a virtue which they have first acquired with reference to the children in their immediate care, and through moral education we may likewise lead capitalists to extend the virtue of economy to publicly owned property. The Platonic method of securing disinterested love of society on the part of its guardians was given a partial trial in the case of the celibate, propertyless monks of the middle ages, and proved a failure. The Aristotelian method rests upon a sounder psychology, and is more in harmony with the modern spirit. Let us grant that individual owners of private property, like individual fathers of families, are often too narrow in the range of their sympathies, and hence become hard and cold toward matters of public good. The remedy for this is to lead them to extend their range of interest to the property held by society as a whole. Once a virtue has been brought into existence within a narrow range, its scope may gradually become extended with further development. But a virtue can only arise and begin its development within a narrow personal circle. All our knowledge of moral evolution abundantly shows this to be the case.

We may therefore conclude that the aims of social justice and the right to private property are compatible.

Only that society could be called truly social in which every individual enjoyed free opportunity to develop his personality in every important respect, including a liberal education and the acquisition of private income-producing property.

CHAPTER XXX

ORTHODOX AND COLLECTIVIST THEORIES OF PROPERTY [1]

With the diversity of forms which the institution of property has assumed in the course of social evolution, we may usefully compare some distinctive theories which have been held by thinkers of its basis and functions. We may consider first those who have attacked the institution of private property altogether, in the interests of communism; secondly, those who have found a general justification for the institution of private property either in its economic or in its ethical value; and thirdly, those who have held that the solution lies in the discrimination of kinds of property and the function which each severally performs.

(*a*) Property has sometimes been attacked on philosophical, sometimes on religious grounds. In the Republic, the object of Plato is to set out in clearest possible outline the picture of a completely unified State. The State is to be so compact a unity that, if one of its members suffers, it is to feel that it suffers in that member, just as when the finger aches the man feels the ache in the finger. Looking over the rallying points at which the individual can assert himself against the social unity, Plato finds them conspicuously in family life on the one hand and in

[1] [By Leonard T. Hobhouse: born, 1864; since 1907, professor of sociology, London University.

His works include: "The Labor Movement" (1893); "The Theory of Knowledge" (1896); "Mind in Evolution" (1901); "Democracy and Reaction" (1904); "Morals in Evolution" (1906); "Development and Purpose" (1913).

The selection above is reprinted from "Property: Its Duties and Rights" (London: Macmillan & Co., Ltd., 1913), pages 23–31.]

property on the other, and he proceeds to the abolition of both; at any rate, the guardians, who are to lead the highest, the most completely social, and the most fully philosophic life, can have no room in their minds either for family or for economic cares. Communism is advocated in the interests, not of enjoyment but of austerity; and in this the Platonic philosophers may be regarded as prototypes of the monastic community. In both cases it is open to criticism to maintain that social unity is pushed to a point at which personality is obliterated, and that the independence of material things is expressed in a form in which it defeats itself. Man cannot live without material things, and in so far as he is dependent for his necessaries on the will of others, his life is also dependent upon these others. Where he cannot move hand or foot without them, he abandons self-direction, and the self-denial, which was to give spiritual freedom, ends by denying autonomy altogether.

But the principle of property was also criticized in antiquity from the point of view of Natural Law. Property, it was clear to the thinkers who introduced this conception into ethics, was a human institution. The gifts of nature, the land and its fruits, must originally be free to all men; appropriation was the act of man, and the institutions by which appropriation is regulated derived from man-made laws. Just as by nature all men are free and equal, so by nature they have a right to use the earth and its fruits for their own purposes, to apply their labor to them freely, and to enjoy the product at their will.

This conception of a natural Communism underlying the institutions of positive law was taken up by the Early Church, where it fused with the conception of a Christian Communism, based, not on the Platonic principle of an abstract unity, but on the ideal of brotherly love and mutual aid as between co-religionists, the sons

of one Father, the members of one household. This was an ideal which could only be effective among the members of a small community; and when the Church had seriously to undertake the problem of reconciling State law with Christian ethics, it had to fall back on the Stoic distinction between the law of nature and the positive institutions of government. The fabric of society was accepted, and though Communism is proclaimed as the law of nature at the outset of the Canon law, it is not so interpreted as to direct or to qualify those institutions of State which determine the conditions on which property is held, and by which wealth is distributed, excepting in so far as it secures the levy of a tax on wealth for the service of the Church and of the poor. The theory of Communism, as qualified by respect for established institutions, becomes a doctrine of charity.

In point of fact, as a political doctrine, Communism is an emotion rather than a system. In a small community it has its place. Every family, while the members live together, is in essence a communistic unit; and Communism may be conceived as operating successfully among any small group of enthusiasts as long as the enthusiasm is maintained. In the larger world the communal principle has its place only in respect of the enjoyment of those things in which no correlative performance of duty is requisite. Public spaces, recreation grounds, the advantages of lighting, and, in some respects, of cleaning, sanitation, order and good government, are common property in the strict sense of the term. Everybody can enjoy them without payment, for some of them are things which cannot exist at all unless they are available for every one, and others cost no more when available to all than they would if restricted to a few. But Communism of this kind only touches the outside of life.

(*b*) For the regular working of the economic order it has been clear to most thinkers that there must be some

systematic apportionment of the instruments of production, and the fruits of industry. The social organism has many functions, and each function requires its due stimulus and sustenance; hence the most popular theory of property associates it with the right to labor and the product of labor. On this basis Locke finds a justification for property antecedent to positive law. By the law of nature the earth stood open to all men, but also by the law of nature a man had the right of property in his own person, and in that which he wrought with his hands. Accordingly, that in which he "mixed his labor" became his own, and this would include the portion of soil which he reclaimed by occupation and tillage. But in this conception, as Locke apparently recognizes, property is limited by use: "As much as any one can make use of to any advantage of life until it spoils, so much he may by his labor fix, and property in whatever is beyond this is more than his share, and belongs to others." Hence Locke protests that this theory is incompatible with "engrossing." Unfortunately he only works it out for "Americans," as typical instances of people who live under conditions where land is still superabundant. And when he comes to consider property as an established institution of organized society, he can only tell us what is painfully obvious, that "it is plain that the consent of men have agreed to a disproportionate and unequal possession of the earth — I mean out of the bounds of society and compact, for in governments the laws regulate it, they having by consent found out and agreed in a way how a man may rightfully, and without injury, possess more than he himself can make use of, by receiving gold and silver."

Locke, it is true, states in general terms that laws and government ought to accommodate themselves to the principles of natural law; and if we press this principle in the case of property, it seems clear that Locke might

be led, if he were living now, to somewhat radical conclusions. Be this as it may, we find in Locke the basis of a view which is at once a justification of property, and a criticism of industrial organization. Man has a right, it would seem, first to the opportunity of labor; secondly, to the fruits of his labor; thirdly, to what he can use of these fruits, and nothing more. Property so conceived is what we have here called property for use. The conception is individualistic, but it may be given a more social turn if we bear in mind, first of all, that society as a collective whole is that which determines the structure and working of economic institutions; and secondly, that in a society where men produce for exchange, labor is a social function, and the price of labor its reward. Locke's doctrine would then amount to this, that the social right of each man is to a place in the economic order, in which he both has opportunity for exercising his faculties in the social service, and can reap thereby a reward proportionate to the value of the service rendered to society.

(*c*) But there exists a much more radical Individualism than Locke's, which also ascends to antiquity. The Aristotelian criticism of Plato proceeds partly from the just conception that unity is only one feature of social life, and that the true community must be a whole of many diverse parts. It rests also upon the conception that property is among the external good things which are necessary to the full expression of personality. In emphasizing this side of the matter it may be allowed that Aristotle lets the communal principle evaporate into a mere pious aspiration. Private possession and common use is a pleasant phrase, but, we may safely maintain, remains a mere phrase. It is no organic law for society to lay down, that men should use their possessions in the spirit of the proverb that "the things of friends are common."

The center of this line of thought is the conception that

property is an instrument of personality, and in that form it has been revived and has played an important part in modern thought. In general terms, what has been said at the outset will have justified this principle by anticipation. Material things that a man can count upon as his own, that he can leave and return to, that he can use at his will, are, we have admitted, the basis of a purposeful life, and therefore of a rational and harmonious development of personality. But as a basis of the institution of property this principle carries with it consequences which seem too often to be overlooked. On the one hand it carries the condemnation of a social system in which property of the kind and amount required for such develment of personality is not generally accessible to all citizens, who do not forfeit their right by misfeasance. A society which should accept this principle, could not tolerate anything like the existing distribution of wealth, could not permit those methods of accumulation which concentrate wealth in the hands of the few, and leave the many — so far as the practical object of earning their living is concerned — as naked as they were born. Cherished as a Conservative principle, it has in it the seed of Radical revolution. And secondly, if this principle would require the universal distribution of the means of subsistence, it would also limit the accumulation of property by the measure of that which is healthy for the soul. The possession of property which emancipates from toil, the possession of property which makes, not for the guidance of self, but for the control of others, stands on this principle condemned; and what is a justification of property becomes a reprobation of riches. Ethical individualism in property, carried through, blows up its own citadel.

(*d*) There remains the Socialistic conception of property, the term by which in general we may express any theory which distinguishes between the appropriation of the means of production and the appropriation of the fruits

of labor. The difficulty of this theory, considered merely as a theory — for we are not here concerned with practical applications — is, in the first place, to discriminate neatly between the two kinds of property; and in the second place, to determine the conditions of access for the individual to the means of production, and the ethical basis and measure of his reward. But at the outset let us be clear as to the distinction between the Socialistic principle and the Communist. To the Communist all things are equally the objects of enjoyment, without payment made or service rendered. To the Socialist — or indeed to any society so far as the socialistic principle is applied — property is not common to all, but is held in common for all, and its assignment or apportionment is a matter of collective regulation. There is no enjoyment without correlative performance of function. The problem before the Socialist has always been to consider how this collective regulation can be accommodated to the free initiative and enterprise of the individual; and it may be doubted whether, upon purely socialistic principles, this problem is capable of solution.

The problem is complicated by the psychological difficulties of democratic organization. We talk easily of a common property, of a common industry directed to the common good and organized by the general will; but where is the general will? Is it a figment of the rhetoricians, or is it a working reality in actual life? In practice, does it mean a collective decision, to which the ordinary man contributes, and in which therefore his personality may, in a genuine sense, be said to be expressed? Or does it mean the fiat of statesmen and of experts, sheepishly accepted by the crowd because they see no way of escaping it? On the former alternative, collective property might truly be regarded as having that same organic relation to personality as is possessed by the peasant's plot of ground in relation to the pro-

prietor, who knows the capacity of every square yard of it. In the latter alternative, collective industry becomes a mechanism, in which each man might be reduced to the part of an unthinking cog, grinding his grind with no more freedom than the factory hand under the capitalist employer, and with no more sense of the social value of his work than the machine-minder performing a fragmentary process in the manufacture of an article, which, whether sound or unsound, wholesome or unwholesome, will go to the use or the annoyance or the injury of people whom he has never seen and never will see. Considerations such as these have led some of the more generous minds of our own time to look for the reform of property rather in a revived individualism than in furthering the collectivist tendencies, which, of late years, have influenced legislation. Their ideal would be something like the medieval organization, without its restrictions on personal freedom. They sigh for the day of the small landed proprietor and the master workman.

In relation to the land this conception, no doubt, has a certain limited applicability; but in the main its development seems barred by the hard facts of economic development, making for the large scale of production and the complex interchange of goods throughout the world market. Yet the principle is in so far just that it recognizes an indestructible core of value in the idea of property. Only it has to be maintained that, if private property is of value, for reasons and within limits that have been indicated, to the fulfillment of personality, common property is equally of value for the expression and the development of social life. The problem of modern economic reorganization would seem to be to find a method, compatible with the industrial conditions of the new age, of securing to each man, as a part of his civic birthright, a place in the industrial system and a lien upon the common product that he may call his own,

without dependence either upon private charity or the arbitrary decision of an official.

The other side of this problem is that of securing for the State the ultimate ownership of the natural sources of wealth and of the accumulation of past generations, together with the supreme control of the direction of industrial activity and of labor contracts. We cannot reconstitute the early commune. We cannot secure for each man his inheritance, his virgate, and his plow team. What we have to aim at would seem to be an analogous relation between the individual and the community, adapted to the complexity of modern conditions, combining the security of the old régime with the flexibility and freedom of the new, partly by education and training, partly by the supervision of industrial organization. We have to restore the contact between the individual and the instruments of labor. We have to assure him of continuity in employment, and — given reasonable industry and thrift — of provision against the accidents of life and the periods of helplessness. And for these purposes we have to restore to society a direct ownership of some things, but an eminent ownership of all things material to the production of wealth, securing "property for use" to the individual, and retaining "property for power" for the democratic state.

CHAPTER XXXI

PHILOSOPHICAL THEORIES OF PROPERTY [1]

For the most part the modern attempts to place the rights of property upon an *a priori* basis have followed very much the lines laid down by Locke. Kant, who introduced such a "Copernican revolution" in Metaphysics, was the author of no new principle in politics. He accepted the social-contract view as to the origin and authority of the State in its crudest and most individualistic form, and he based property, like Locke, on what we may call the divine right of grab. The first occupier acquired thereby a sacred right to the ownership of it for all eternity. He introduced a qualification of the theory which brings out with peculiar distinctness its wholly unethical character. He held that a man has only a right to so much property as he can defend, and on this basis attempted to place on an *a priori* footing the convenient but arbitrary rule of international law which makes the dominion of States extend three miles into the sea, this being in Kant's time the maximum range of artillery. What Natural Law will have to say when the guns on both sides of the English Channel can equally sweep the middle of the intervening waters is a problem which he

[1] [By Very Rev. Hastings Rashdall: born, 1858; since 1917, dean of Carlisle.

His works include: "The Universities of Europe in the Middle Ages" (1895); "Doctrine and Development" (University Sermons) 1898; "Christus in Ecclesia" (1904); "The Theory of Good and Evil" (1907); "Philosophy and Religion" (1909); "Is Conscience an Emotion?" (1914); "The Idea of Atonement in Christian Theology" (1919).

The selection above is reprinted from "Property: Its Duties and Rights" (London: Macmillan & Co., Ltd., 1913), pages 52–64.]

has naturally not discussed. In Kant, however, the theory as to the way in which property could be acquired in a state of nature was seriously modified in its application to organized civil society. In civil society property can only be acquired by the implicit consent of Society, to which the State itself owes its authority. And the proper limits to the State's authority are fixed by the principle that the State's duty is to exercise the minimum of restraint under which the maximum liberty of each shall be compatible with the maximum liberty of every other. By a maximum of liberty he did not mean any of the subtler ethical ideas which have been read into the phrase by later Idealists who have used the same language, but simply freedom from constraint. It would be impossible further to develop Kant's view of property without discussing his whole conception of the nature of the State and of human society. It will be sufficient to say that the influence of Kant has produced a disposition among idealistic Philosophers to regard the rights of property as natural rights. We find in them a tendency to use the formulæ of the old individualist theories, but to give them an attenuated or sublimated meaning.

Hegel, for instance, — the most influential of these writers, — tells us that "a person has the right to direct his will upon any object, as his real and positive end. The object thus becomes his. As it [the object] has no end in itself, it receives its meaning and soul from his will. Mankind has the absolute right to appropriate all that is a thing." It will be observed that in this passage Hegel passes from "a person" to "mankind" as though the change made no difference. Nothing can be more reasonable than that "mankind" has a right to appropriate material things; nothing more unreasonable than to say that any individual has a right to appropriate any object he pleases, without considering the effects of such appropriation upon others. In so far as Hegel is the

asserter of a vast system of absolute, isolated, self-evident "rights," his system is open to all the objections which we have noticed to Locke's theory and to the intuitive systems of Rights and of Morals generally. As regards such questions as that of property, his speculations were prevented from leading to any really satisfactory results by his determination at all costs to defend the existing order of Society and even the most accidental peculiarities of the Prussian Constitution of his time. Every Prussian institution is shown to flow from a necessity of thought: in England and France apparently the development or self-manifestation of the "idea" had constantly gone wrong. But in two ways Hegel contributed to a better theory of property. In the first place, although he still used much of the old individualistic language, he had a more "organic" view of the nature of Society and a juster view of the functions of the State. He took a more spiritual view of the functions which the State could perform, and consequently the moral as well as the merely economic advantages of private property begin to come into prominence. In the second place he insisted upon one particular advantage of property by making much of the doctrine that property is an expression of personality. Sometimes this doctrine is in Hegel couched in somewhat bombastic and by no means illuminating language: "To appropriate is at bottom only to manifest the majesty of my will towards things," and so on. Merely to say that property is an expression of personality does not really close the controversy; for after all, why should personality be expressed except in so far as this is a means to human good or actually constitutes that good? The real difficulty of the problem begins where these expressions of my personality begin to get in the way of other people expressing their personalities too. But the doctrine does supply a much needed corrective to the ordinary utilitarian view, and has tended towards the recognition

of the importance both of character and of intellectual development as elements in the total Well-being at which both legislation and individual conduct should aim.

In order to keep our review of modern thought on this subject within limits it will be well to confine ourselves to two of the more recent tendencies of political thought, and to take our illustrations from this country only. Towards the middle of the nineteenth century the influence of the Utilitarian School in its Benthamite form began to be disputed by the growth of a school which professed to found its doctrine upon the Darwinian doctrine of Evolution. The most popular representative of this tendency was Herbert Spencer. His Ethics were fundamentally Utilitarian; but he attempted to extract from the teaching of Darwinism the doctrine that, as a means to the increase of pleasure, it was essential that the struggle for existence should go on unchecked by excessive State interference. Any meddling with private property which went beyond the most indispensable taxation was held to constitute such an excessive interference; and in his zeal for Individualism he revived what was substantially the theory of Locke, and justified the extremest view of the sacredness of property on the ground of a man's natural right to the produce of his labor. The total inconsistency between this theory and the "scientific" Utilitarianism which he professed in his ethical writings appears to have escaped his notice. He defends the principle as a self-evident or *a priori* truth, and expressly identified his teaching with that of Kant, professing (as was his wont) that he was in no way indebted to that philosopher (whom he had not read) or to any other previous thinker. He pushed his practical conclusions far beyond the point reached by Kant (who, with all his Individualism, was not quite uninfluenced by the German respect for the State), and treated the Free Libraries Act as a mere piece of robbery on the part of Parliament —

as much so as the act of any private individual who should walk into my library and help himself to my books. This *a priori* theory has already been sufficiently examined. As to the attempt to reinforce it by the application of Darwinism to politics, it will be enough to say here that it assumes that the system of private property involves a less measure of State interference than a system of Socialism or even Communism. A very little reflection will show that it is not through an unrestricted struggle for existence, through *laisser-faire* on the part of the State, that an infant of two inherits on the death of his father a landed estate extending over half a county. It is rather owing to an extreme interference on the part of the State with the "natural right" of the strong man to grab the vacant estate, and to the employment of a host of legal officials, police, and (if necessary) soldiers to prevent the fight for the property which in a "state of nature" would inevitably ensue upon the death of the last owner. While the popularity of evolutionary theories in the region of Ethics is by no means at an end, this political application of the Darwinian theories is too much out of harmony with the practical tendencies of the age to exercise very much influence. One still sees a tendency towards an individualistic application of the "struggle for existence" doctrine among men of scientific education; but neither in the region of practical politics nor in that of political speculation can Spencerianism as a system now be regarded as a very serious force.

The other new factor in recent political thought comes from the gradual diffusion among university students, and through them among a wider public, of German Idealism, especially in its Hegelian form, and also, it may be added, of the Platonic and Aristotelian view of the State which was to a large extent the source of what is best in the political thought of Hegel and his disciples. In England the first writer who exercised a powerful

influence in this direction was Thomas Hill Green, who first as a tutor of Balliol and then as Professor of Moral Philosophy was the most influential teacher of philosophy in Oxford for some twenty years before his early death in 1882. Most of the recent contributions to political thought of the more speculative type owe a good deal to the teaching of Hegel, either directly or through Green. I may add that, though the debt to Hegel is undoubted, the version of his teaching which is given by his English disciples is far clearer, freer from absurdity, and more soberly thought out than is the presentation of it in the writings of Hegel himself. The reader who begins with Green's "Principles of Political Obligation" and goes on to Hegel's "Philosophy of Right" will probably feel that there is little of value in Hegel which is not better put by Green.

The versions of Hegel's theory about property which are to be found in the writings of his English disciples naturally vary according to the degree of their own approach to Socialism. In the writings of Green the Hegelian reverence for the State and the Hegelian respect for property as the expression of personality are about equally prominent. His strong sense of the necessity of property for the building up of character led him, however, not so much to exalt the sacredness of property in the hands of the large owner, as to insist on the necessity of such legislation as would tend to the diffusion of property as widely as possible among the masses. A more socialistic version of the Hegelian teaching is to be found in the writings of the late Professor Ritchie; while of a more individualistic interpretation the most conspicuous representative is Professor Bosanquet.

Our present concern is, however, not so much with practical applications or deductions as with the theoretical determination of the ultimate principle by which the question as to the best way of distributing the fruits of industry ought to be decided. When stripped of techni-

calities, the general tendency of modern political philosophy — at least as represented by the more idealistic or spiritualistic writers — is towards the view that the justification of the institution lies in its tendency to promote for the whole community a Well-being which is not to be identified with pleasure, but which includes the development of character and intelligence as well as pleasure. Property is, as Aristotle held, an instrument of the best and highest life. That arrangement of property is best which tends to secure such a life for the whole community or for as many as possible. It is clear that if this view of the justification of property be adopted, not the same system will be suitable at every time and place. Everywhere the established system has a *prima facie* claim to acceptance. Some system for apportioning wealth is the very first condition of social well-being, and the maintenance of any such system is always better than anarchy and confusion. But every improvement in the established system which will tend to promote that end better has every justification which can be claimed for the existing system. And the existing system loses its justification the moment it is shown that it can be improved. It is extremely important to realize that the question is not as to the rival claims of two sharply opposed, cut and dried systems — one a system of private Capitalism and the other a system called Socialism. Private property has meant an immense number of different things at different times and places. Everywhere there has been some subordination of private property to the authority of the State in the interests of general welfare; and everywhere some collective ownership has subsisted side by side with private ownership. The King or the State, the Municipality and all sorts of other corporations, have everywhere been large property-owners; and all States have exercised some sort of control over the use men make of private property. The practical question is,

"By what system will men be most stimulated to make a maximum contribution to the general welfare, and what system will lead to the widest possible diffusion of the highest kind of life?" Under different conditions every system, from a tolerably extreme individualistic system of private property to a rather extreme collectivism, might be the best possible for the particular time and place. To devise the best possible system for a given time and place is a question rather of practical politics than of political theory.

Are there then, it may be asked, no limits to the socialization of industry which might conceivably be desirable under particular circumstances? Could a complete suppression of all private property be conceivably the best system under certain conditions? Or is there any sense in which we may say that a right to private property is one of the eternal and unchangeable "rights of man"? It is probable that the unchangeable character of human nature will always set strict limits to the possibility of dispensing with individual and family interest as a stimulus to the production of wealth; and some liberty of individual action, some sphere for the operation of individual enterprise and energy, will always be desirable on economic grounds. But a much more certain ground for insisting on the permanent necessity of private property as an institution is to be found in what has already been said as to the necessity for the development of character. Some liberty of action, some form of arranging one's own life in advance, some freedom of choice, and some certainty that a man will experience the results of his choice, are essential to the development of character; and this there cannot be unless there is some permanent control over material things. Supposing the whole object of life were to secure a maximum average of enjoyment to each individual, it is quite conceivable that, if only certain initial difficulties of organization could be got over, a

higher average could be reached by some extreme communistic arrangement under which any man, woman, or child would be "taken in and done for" by the State or the Municipality — fed, clothed, instructed, amused, provided with a set task, compelled to work — from the cradle to the grave. Not so, if the object we have in view is the calling out into activity the individual's best and most varied energies, moral and intellectual. Nobody has expressed this more forcibly than Professor Bosanquet. Professor Bosanquet's Essay on "The Principle of Private Property," in the collection of Essays called "Aspects of the Social Problem," is perhaps the best brief treatment of the subject which has ever been put into print. He insists that for a man to have everything provided for him reduces him to the level of a child.

"Let us take the child in the family as the extreme type, and leave out any imitation of grown-up life which his parents may introduce by way of discipline, by taking away what he wastes or spoils, and so forth. His relation to things has no unity corresponding to his moral nature. No nerve of connection runs through his acts in dealing with the external world. So with his food; he may waste or throw away his food at one meal, he gets none the less at the next (unless by way of discipline). He gets what is thought necessary quite apart from all his previous action. So too with his dress. The dress of a young child does not express his own character at all, but that of his mother. If he spoils his things, that makes no difference to him (unless as a punishment); he has what is thought proper for him at every given moment. So with travel, enjoyments, and education up to a certain point. What he is enabled to have and do in no way expresses his own previous action or character, except in as far as he is put in training by his parents for grown-up life. The essence of this position is, that the dealings of such an agent with the world of things do not affect each other, nor form an

interdependent whole. He may eat his cake and have it; or he may not eat it and yet not have it. To such an agent the world is miraculous; things are not for him adjusted, organized, contrived; things simply *come* as in a fairy tale. The same is the case with a slave. Life is from hand to mouth; it has as such no totality, no future, and no past.

"Now, private property is not simply an arrangement for meeting successive momentary wants as they arise on such a footing as this. It is wholly different in principle, as adult or responsible life differs from child-life, which is irresponsible. It rests on the principle that the inward or moral life cannot be a unity unless the outward life — the dealing with things — is also a unity. In dealing with things this means a causal unity, *i.e.* that what we do at one time, or in one relation, should affect what we are able to do at another time, or in another relation. I suspect that the difficulty in accepting this principle is largely due to a mistake about inward morality — to treating the pure will for good as if it could exist and constitute a moral being without capacity for external expression. This is a blunder in principle. If all power of dealing effectively with things is conceived absent, inward morality, or the good will, vanishes with it. I will return to this point in dealing with the 'no margin' doctrine.

"Private property, then, is the unity of life in its external or material form; the result of past dealing with the material world, and the possibility of future dealing with it; the general or universal means of possible action and expression corresponding to the moral self that looks before and after, as opposed to the momentary wants of a child or of an animal. A grown man knows that if he does this he will not be able to do that, and his humanity, his powers of organization, and intelligent self-assertion, depend on his knowing it. If he wants to do something in particular ten years hence he must act accordingly

to-day; he must be able in some degree to measure his resources. If he wants to marry he must fit himself to maintain a family; he must look ahead and count the cost, must estimate his competence and his character. That is what makes man different from an animal or a child; he considers his life as a whole, and organizes it as such — that is, with a view to reasonable possibilities, not merely to the passing moment.[1]"

All this is perfectly true and admirably put. The necessity for some liberty and some variety of external circumstances and modes of life for the highest intellectual development is another important consideration which has been much insisted upon by such writers as Durkheim and Simmel. And here it is important to notice that the plea for liberty is not sufficiently met by insisting, as has been so eloquently and humorously done by Mr. Lowes Dickinson, upon the absurdity of supposing that the propertyless laborer under the ordinary capitalistic régime enjoys any liberty of which Socialism would deprive him.[2] For it may be of extreme importance that *some* should enjoy liberty — that it should be possible for some few men to be able to dispose of their time in their own way — although such liberty may be neither possible nor desirable for the great majority. That culture requires a considerable differentiation in social conditions is also a principle of unquestionable importance. But it must not be assumed that liberty and differentiation and opportunities for the development of character in some or all can only be secured by a continuance of the whole system of private Capital as it is now understood.

Professor Bosanquet and many other philosophical critics of Socialism seem to forget that Socialism does not aim at the extinction of private property but only at that

[1] Essay on "The Principle of Private Property," in "Aspects of the Social Problem," pp. 309–311. For a more elaborate treatment of the subject see his "Philosophical Theory of the State."

[2] "Justice and Liberty: a Political Dialogue" (1908), *e.g.* pp. 129, 131.

of private capital. Under any scheme which is socialistic without being communistic, private property might very well exist in the only sense in which the vast majority (say) of Post Office employees now own property. A postman under Socialism would be able to enjoy property with all its moral advantages as fully as now, except that he would be unable to get interest on the few pounds which he might at present save and put into the Savings Bank. It could scarcely be contended that the right to get a few shillings interest upon such savings is absolutely necessary to a man's moral well-being. Professor Bosanquet assumes much too readily that the moral advantages of Socialism could not be secured without the permission of capitalization and of inheritance. No doubt, when we think not so much of the moral effects upon the average individual as of the advantage to the community generally of having some persons in a position to choose their own tasks and dispose of their own leisure, the difficulty of getting the advantages of property without these incidents of our present capitalistic system becomes much greater. I am myself disposed to think that the institution of property cannot bring with it its full advantages, economic, moral and social, without *some* form of capitalization and *some* rights of inheritance, however much these rights may be curtailed and controlled by the State. But the form which it is desirable that the institution of property should assume must be settled by detailed argument as to its advantages and disadvantages; it must be settled by experience, and with reference to each particular stage of social development. We cannot justify the whole capitalistic system *en bloc* by the bare formula that property is necessary to the development of individual character. The most that we can claim, as a general principle applicable to all stages of social development, is that without some property or capacity for acquiring property there can be no individual liberty, and that without some

liberty there can be no proper development of character; and further that considerable leisure and liberty of action, such as is now secured by private capital and inheritance, *for some persons* must always be socially desirable. In this sense we may lay it down that the institution of property is one of the permanent conditions of social Well-being or (if we please) one of the inalienable "rights of man." The exact form which it should assume must be settled for each particular stage of social development and each particular country by the gradual accumulation of experience, the gradual development and the gradual criticism of detailed suggestions for social improvement.

Another remark that may be made upon Professor Bosanquet's defense of private property is that, while he admirably develops the good effects of the present system upon character, he seems almost blind to the bad effects upon character of the present almost unlimited competition and facility for accumulation. It is undoubtedly a mistake to talk as though all that was required for "character" was a vague and flabby "altruism." In the interests of Society itself such virtues as industry, foresight, self-reliance, self-respect, and the like are quite as important as the more obviously and immediately other-regarding virtues. But the intense selfishness fostered by our present system must not be ignored. I must, however, leave to other writers the further discussion of the problem of Property in its practical application. The leading idea which I have attempted to bring out by means of this brief historical sketch is that the justification of property must depend not upon any *a priori* principle but upon its social effects. Among these effects a prominent place must always be given to its effects upon character, and the justification of every proposed amendment of the institution as it now exists must depend upon these same principles. The problem of the future is to devise a gradual modification of the system by which its

advantages — the encouraging of industry, originality, energy, enterprise, individuality which it affords, the measure of liberty for all and the greater liberty which it secures for a few, the training in character and the development of individuality, the sense of responsibility and of family solidarity which it encourages — shall be secured without the outrageous inequalities, the material hardships and uncertainties, and the injury to character which are produced alike by excessive wealth and excessive poverty.

CHAPTER XXXII

THE FUTURE OF PRIVATE PROPERTY[1]

While it is true that the power given to individuals by private property tends to efficiency when rightly used, that does not remove the evils produced by the irresponsible power thus acquired with property. It may be the case that as yet no means have been devised which can prevent these evils without also taking away the advantages of private property, and that they are a price which is worth paying. On that point opinions will differ. But obviously it would be desirable if the efficiency produced by the encouragement of individual initiative and the entrusting of power into the hands of individuals were combined with some means of preventing that power being abused, with some method of enforcing responsibility. Even if we hold, as some do, that to encourage in individuals possessing property a sense of this responsibility is all we can compass at present, we need not give up hope of contriving something better in the future.

Here we have the analogy of the control of political power to encourage us. Indeed once we realize that property exists mainly as power, we can see that the problem of the proper regulation of property is only the old political problem of the recognition and control of political power in a vastly more complicated form. The same difficulty of combining the efficiency which is given by the concentration of power with the prevention of its abuse and the insistence that such power

[1] [By A. D. Lindsay: Fellow and Tutor in Balliol College, Oxford. The selection above is reprinted from "Property: Its Duties and Rights" (London: Macmillan & Co., Ltd., 1913), pages 79–81.]

shall be used for social and not for anti-social ends, has been realized and to some extent solved in the political sphere. The pressing need for strong and efficient government in the sixteenth and seventeenth centuries made writers like Hobbes treat political power as the absolute property of the sovereign, and denounce any attempts to limit such power or make it responsible as fatal to the efficiency of government. Means of combining efficiency with popular control have been evolved but slowly; no ready-made or simple solution could possibly have been found; it needed the political experience of generations to achieve a system of responsible government. At first the possibility of good government depended on individual rulers choosing to act as though they were responsible to their people. But there has grown up such a system of government as makes the irresponsible use of political power difficult if not impossible.

The problem of combining the free use of power and individual initiative with their control in the interest of society, of giving scope and yet preventing the evils arising from irresponsibility, will probably be much more difficult in the sphere of economic production than in that of government for various reasons. (1) The problem has been solved in the political sphere only by a strict limitation, in the early stages of the solution at least, of that sphere. The power given by property extends to every corner of social life, and is infinitely more indeterminate and fluid than political power. (2) The problem has to be solved without destroying private property in the means of expenditure and consumption, and it is not easy to draw the line between the two forms of property more than roughly. (3) Initiative and inventiveness are more important in the economic than in the political sphere, and regulation of economic will have to be more elastic than regulation of political power.

We may be confident that no simple ready-made

solution of it will be found. But that is no reason for supposing that the task is impossible or that the present makeshift system is the only one that is possible. Without being able at this moment completely to work out a better system we may be able to see the direction in which development is desirable. In the meantime, if we realize that the existing institution of private property is not based on absolute right and has no absolute but only a partial justification, in that while it makes for the good life of men in society it does so at a considerable cost, we may see that the system will be tolerable only if the possessors of property act as the good sovereign of earlier times acted — as though, that is, they were under obligations which law is not yet able or does not think it convenient to enforce.

CHAPTER XXXIII

CHRISTIANITY AND PROPERTY[1]

Our industrial organization has found it essential to its success to wipe out the multitude of small owners, who once found their place in our trade. It has stripped the agricultural laborer of all that gave him a hold on the land. The vast mass of workers in our towns have long ago ceased to have any right of possession over the tools or materials of their occupation. They have dropped to the position of pure wage-earners, and that means that they have no secure footing of their own, no self-dependent area on which to fall back, no reserved resources which are under their own control and direction. Their existence is never in their own hands; nor are they responsible for their own maintenance. The stability, the power to look before and after, the assured hold on reality, the embodiment of their own wills in a material fact, which we philosophically recognize to be the moral and spiritual value of private ownership, — all this is denied them. They enjoy no sense of background such as would endow their individual lives with a certain dignity. They exist on the surface; they cannot strike roots, and establish permanency. The forces on which their very being depends are wholly out of their ken or power. They are regulated by others, who are out of sight. They themselves live by the day or the week, and are liable to every sort of accidental or unanticipated displacement. It is

[1] [By Rev. Henry Scott Holland, D.D.: Regius Professor of Divinity, Oxford, and Canon of Christ Church.

The selection above is reprinted from "Property: Its Duties and Rights" (London: Macmillan & Co., Ltd., 1913), pages 183–192 (parts omitted).]

just the moral discipline of responsible ownership which they are bound to lack. This is the class which our system of industry sets itself to create and use, both in town and country. Its work is rested entirely on the wage, and the wage means the absence of ownership.

And not only so, but the permanent claim made for the right and value of private property is so used as to make the many the practical property of the few. Property is not valued for its use, but for its power, as Professor Hobhouse has shown. The owner does not claim what is his own for the sake of using it. For, indeed, he owns far more than he can ever dream of using. The unhappy multi-millionaire cannot consume, through his own efforts, more than £10,000 a year, as one of them dolefully confessed. If his income is over a million, then all this surplusage goes to enlarge his domination. What he does is to exercise power over others. He can prescribe for them what their life shall be; what opportunity they will have for gaining a livelihood; where they shall live, and under what conditions. He has thousands upon thousands dependent on him for their existence. He utilizes their labor, and turns it to efficient exercise and profit. His private property gives him the power by which others are deprived of their possession of themselves. Thus the great capitalist, by the exercise of his own right of ownership, limits and cancels the self-ownership which others might enjoy. Himself the great illustration of the capacities of private property, he is also, by that very fact, the great example of its destruction. . . .

Individualism, then, finds its worst opportunity in an individualistic society. The law of competition, working under our present capitalism, while offering scope and fulfillment to the very few, wrecks and undermines the individuality of the many. And this it does just because it gives to so very few the chance of embodying the permanent worth of the personality in any enduring right of

possession. It leaves the vast multitude of workers to become mere items on the surface, without any secured future, without any sure grip on facts, without any stored reserve, without any established status. Personal value finds no public witness. Character has no firm pivot round which it can build up its fabric. The inner life misses its outer support. . . .

Shall we try to see how the trouble began? And, reviewing the last three centuries of our social evolution, shall we not be justified in suspecting that it is our philosophy of personality which has been at fault?

We laid hold, at the Reformation and the Revolution, on the supreme value of personality; and we found the secret of this value to lie in the sanctity and freedom of the individual man. We isolated this core of individuality; and we attributed to it, in its isolation, all its high privileges and prerogatives, all its sacred rights and inveterate claims. The individual man justified himself. He constituted his own natural right to live, to grow, to put out his powers. He was the spring of his own liberty, and the owner of his own activity. . . .

But can an individuality ever be isolated? Was this not a false start? What is individuality? And where is it to be found? Can it appear, can it exist, except in a community of which it is the representative organ? The individual man draws all his significance out of the fact that he is the expression of some social body to which he belongs. He is a member of his race, of his nation; on that depends in fact his individual worth. This is why he counts. He is a sample of what his nationality means. Every claim that he makes for himself can be made in pressing the same terms for others. He cannot give himself any value that he denies to others. As he rises into free self-assertion, so these others rise all round him with identical rights. He and they are created by the same act and under the same law. He can never be

intelligible except in terms which include and involve others. Individuality, then, is really representative, is corporate, is social, by the very principle of its life. It can only be understood as the unit of a society.

And this only leads us down deeper into the root-conception of personality which finds expression in individuality. Personality lies in the relation of person to person. A personality is what it is only by virtue of its power to transcend itself and to enter into the life of another. It lives by interpenetration, by intercourse, by communion. Its power of life is love. There is no such thing as a solitary, isolated person. A self-contained personality is a contradiction in terms. What we mean by personality is a capacity for intercourse, a capacity for retaining self-identity by and through identification with others — a capacity for friendship, for communion, for fellowship. Hence the true logic of personality compels us to discover the man's personal worth in the inherent necessity of a society in which it is realized. Society is, simply, the expression of the social inter-communion of spirit with spirit which constitutes what we mean by personality. Fellowship and Individuality are correlative terms. . . .

Personality, then, is always collective in basis. In every individual act and word it is putting out power which comes to it through its place in the community. The "moi" which asserts its free individuality is still the "moi commun" of Rousseau. It may legitimately claim the right to personal possession: but the claim so made will belong to it by virtue of its corporate and representative qualification; so that the individual right to own private property is an expression of the community's right to have and to hold its own, put out through the person of one of its members. It can never be an absolute right inherent in the man himself; for he, as a personality, is inseparable from the fellowship which

constitutes his personal existence. He holds what he can call his own by virtue of his status inside the fellowship; and, if so, the justification of his private ownership must always be found in the welfare and the will of the community. . . .

Nor is it only private property that is thus brought into ethical subordination to the needs of social justice, but also new possibilities of ownership are laid open through the recognition of the collective element in personality. For if personality be representative and collective, then it may find its field of exercise and realization through collective ownership. Men may win the moral qualities which the sense of property evokes, by owning things in common.

We have, indeed, seen this happen to the wage-earners by virtue of their Trade Unions. For while the wage system tends to reduce actual ownership to a minimum, and deprives the main mass of the industrial population of that sense of permanent private property which, economically, it rates so highly, nevertheless the workers have contrived, through massing their small subscriptions, to build up Unions with big funds in reserve; and, with the help of this accumulated support, they have recaptured much of the moral force which is embodied in ownership. They gain stability, for instance; they can look before and after. They can secure some control over their own life-conditions. They can get their own will expressed and realized. They can exercise self-responsibility. . . .

And the principle might be carried much further. Through all the volume of factory legislation the Nation is exerting her right of self-ownership. Through it she directs her own destiny; she brings herself into possession of her own affairs; she exercises her right of self-responsibility; she makes her will felt through material expression; she embodies in solid fact her sovereign self-control; for, as she thus governs her life by intention, she makes this

earth her own. The entire Body, then, collectively asserts its power of ownership through the Legislature. . . .

It is beyond the purpose of this essay to discuss how far this collective ownership will carry us. It is enough to have shown that, in it, lies the most available correction of that ironical paradox by which an exaggerated notion of the absolute value of private property has led a Society based on individualism to confine the range of this value within a limited circle.

Obviously, if ownership has the virtues ascribed to it, then it ought to be extended to all. It ought to be included in the universal conditions of citizenship. This is only possible if collective ownership can come into play over and beyond the area which private ownership can cover, and so can spread out, for the many, the opportunity which our present system confines to the few. And this will depend on how far collective ownership can work upon the individual conscience and imagination with the same force as we now attribute to private proprietorship. The confidence with which we meet this last inquiry will depend entirely on our psychological estimate of personality. If anything of what we have said be true, then personality, which is inherently representative, will find its real and rich and effective realization under the terms of collective life. Collective ownership will be an adequate and joyful expression of its inner character and being. We shall be able to translate the old phrase, which declared private property to be a trust for which we shall give account to God, in a new sense. We had haggled over the apparent individualism of such a conception. It omitted all reference to a community. It left the individual alone with God, to answer simply for himself. His fellows had no direct authority to review or decide what his exercise of his trust should be. But, now, we see that the trust that we speak of is a corporate trust. He holds it in and with his fellows. The personality which

is answerable to God for its proper exercise of the trust, has its inherent existence in a fellowship, and, out of the fellowship, it has no authority to act. The trust is a common act. The fellowship is in trust for all that it holds; and the individual, only as organ and instrument of the fellowship. He can be called upon to fulfill the charges for which the community makes itself responsible in the discharge of its trust. It is not a secret affair between him and his God, how he administers his goods. The community can thus require of him whatever it needs in order to justify its own administration of its resources before the bar of God. His right of possession, his use of his own, are always relative to the larger trust within which he acts.

PART III

SUCCESSION

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CHAPTER XXXIV

UTILITARIAN BASIS OF SUCCESSION [1]

After the decease of an individual, how ought his goods to be disposed of?

In framing a law of succession, the legislator ought to have three objects in view: 1st, Provision for the subsistence of the rising generation; 2d, Prevention of disappointment; 3d, The equalization of fortunes.

Man is not a solitary being. With a very small number of exceptions, every man has about him a circle of companions, more or less extensive, who are united to him by the ties of kindred or of marriage, by friendship or by services, and who share with him, *in fact*, the enjoyment of those goods which *in law* belong to him exclusively. His fortune is commonly the sole fund of subsistence on which many others depend. To prevent the calamities of which they would be the victims, if death in taking away their friend took from them at the same time the supplies which they draw from his fortune, it is necessary to know who habitually enjoy these supplies, and in what proportions. Now, since these are facts which it would be impossible to establish by direct proofs, without becoming involved in embarrassing procedures and infinite contests, it is necessary to resort to general presumptions, as the only basis upon which a decision can be established. The share which each survivor was accustomed to enjoy

[1] [By Jeremy Bentham. For a biographic statement see page 92, ante.

The selection above reprinted is from his "Theory of Legislation" (translated from the French of Etienne Dumont by R. Hildreth: London, Trübner & Co., 1871), being pages 177–186 (parts omitted).]

in the property of the deceased may be presumed from the degree of affection which ought to have subsisted between them; and this degree of affection may be presumed from nearness of relationship.

If relationship were the only consideration, the law of succession would be very simple. In the *first* degree of relationship are all those who are connected with you without any other person intervening: your wife, or husband, your father, your mother, and your children. In the *second* degree are those whose connection with you demands the intervention of a single person, or the joint intervention of two persons: your grandfathers, your grandmothers, your brothers, your sisters, and your grandchildren. In the *third* degree are those whose relationship supposes two intermediate generations: your great-grandfathers, your great-grandmothers, your great-grandchildren, your uncles and aunts, nephews and nieces.

But this arrangement, though quite perfect as respects simplicity and regularity, will not answer the political and moral ends to be aimed at by the legislator. It does not correspond to the degree of affection of which, if employed, it must be taken as a presumptive proof; and it will not accomplish the principal object, which is to provide for the wants of the rising generation. Let us leave, then, this genealogical arrangement, and adopt one founded upon utility. It consists in *always giving to the descending line, however long, a preference over the ascending and composite lines.*

Still, it must happen that the presumptions of affection or of want, which serve as a foundation to these rules, will often fail in practice; and that, in consequence, the rules themselves will not accomplish their end. But the power of making a will offers, as we shall see, an efficacious remedy for the imperfections of the general law; and that is the principal reason for sanctioning such a power.

These are the general principles; but how ought they

to be applied in detail, when it is necessary to decide between several claimants?

The model of a law will serve instead of a great number of discussions.

Article I. *No distinction between the sexes; what is said of one extends to the other. The portion of the one shall be always equal to that of the other.*

Reason. — Good of equality. If there were any difference, it ought to be in favor of the feebler — in favor of women — who have more wants and fewer means of acquisition, or of employing profitably what they possess. But the stronger have had all the preferences. Why? Because the stronger have made the laws.

Article II. *After the husband's death, the widow shall retain half the common property; unless some different arrangement was made by the marriage contract.*

Article III. *The other half shall be distributed among the children in equal proportions.*

Reasons. — 1st. Equality of affection on the part of the father. 2d. Equality of coöccupation on the part of the children. 3d. Equality of wants. 4th. Equality of all imaginable reasons on one side and the other. Differences of age, of temperament, of talent, and of strength, may produce some differences in point of wants; but it is not possible for the law to appreciate them. The father must provide for them by the exercise of his right to make a will.

Article IV. *If a child dies before his father, leaving children, his share shall be divided among his children in equal proportions; and so of all descendants.*

This distribution by stocks is preferred to that by heads, for two reasons. 1st. To prevent disappointment. That the part of the eldest should be diminished by the birth of each younger child is a natural event, to which his expectation will conform itself. But in general, when one of the children begins to exercise his reproductive faculty,

that of the father is almost at its end. At that time the children suppose themselves arrived at the point where the diminution of their respective portions ceases. But if each grandson and granddaughter were to produce the same diminution which each son and daughter had produced, the diminution would have no bounds. There would no longer be any certainty according to which they could arrange their plan of life. 2d. The grandchildren have, as an immediate resource, the property of their deceased father. Their habit of coöccupation, detached from their grandfather, must have been exercised in preference, if not exclusively, upon the fund of their father's industry. Add to this, that they have in the property of their mother and her relations a resource, in which the other descendants of their grandfather have no share.

Article V. *If there are no descendants, the property shall go in common to the father and mother.*

Why to descendants before all others? 1st. *Superiority of affection.* Every other arrangement would be contrary to the inclination of the father. We love those better who depend upon us than those upon whom we depend. It is sweeter to govern than to obey. 2d. *Superiority of need.* It is certain that our children cannot exist without us, or some one who fills our place. It is probable that our parents may exist without us, as they did exist before us.

Why should the succession pass to the father and mother, rather than to the brothers and sisters? 1st. The relationship being more immediate, is a presumption of superior affection. 2d. It is a recompense for services rendered, or rather an indemnity for the pains and expense of educating the child. The relationship between me and my brother consists in our common relationship to the same father and mother; and the reason why he is more dear to me than another companion with whom I have passed an equal portion of my life is, his being dearer to those who have my first affections. It is not certain that

I am indebted to him for anything, but it is certain that I am indebted to them for everything. Thus, whenever the stronger title of my own children does not intervene, I owe compensations to my parents, to which a brother can have no claim.

Article VI. *If one of the parents is dead, the share of the deceased shall go to his or her descendants, in the same way as it would have gone, had there been any, to the descendants of the deceased child.*

In poor families, whose only property is household furniture, it will be better that the whole should go to the individual survivor, whether father or mother, with the condition of providing for the support of the children. The expense of the sale and the dispersion of the property would ruin the survivor, while the parts, too small to serve as capital, would soon be dissipated.

Article VII. *Failing such descendants, the whole property shall go to the surviving parent.*

Article VIII. *If both father and mother are dead, the property shall be divided as above among their descendants.*

Article IX. *But the part of the half-blood shall be only half as great as the part of the whole-blood.*

Reason. — Superiority of affection. Two ties attach me to my brother, but only one to my half-brother.

Article X. *In defect of relations in these degrees, the property shall go into the public treasury.*

Article XI. *Under condition, however, of distributing the interest in the form of life annuities among all the relations in the ascending line in equal shares.*

The tenth and eleventh articles may be adopted or not, according to the condition of the public revenue; but I cannot discover any solid objection against this fiscal resource. It may be said that the collateral relations who will be excluded by this arrangement may be in want. But this is too casual an accident to found a general rule upon. They have, as a natural resource, the property of

their respective parents, and they do not form their expectations or fix their plan of life upon this basis. On the part even of an uncle, the expectation of inheriting from a nephew can be but feeble; and a positive law will be enough to extinguish it without violence, or to prevent it being formed. The uncle has not the titles of the father and grandfather. It is true that, in case of their death, the uncle may have taken their place, and acted as a father to his nephew. This is a circumstance which merits the attention of the legislator. The power of making a will would be a remedy for cases of this sort; but that means of obviating the inconveniences of the general law would be unavailing when the nephew died at an age too tender to allow the exercise of that power. If, then, it were determined to soften this fiscal regulation, the first exception should be in favor of the uncle, whether as regards the principal, or only the interest of the property.

Article XII. *To effect a division among the heirs, the property shall be sold at auction; reserving to them the right of making such other arrangements as they may think proper.*

This is the only means of preventing a community of goods, an arrangement the pernicious consequences of which will presently be pointed out. Such of the property as may have a value of affection, will find its true price from the competition of the heirs, and will turn to the common advantage, without producing those disputes which occasion durable animosities in families.

Article XIII. *Until sale and division be made, the whole property shall be intrusted to the keeping of the oldest male heir of full age; reserving to the court to make other arrangements, through apprehension of bad management, specified on the hearing of the case.*

Women in general are less fit for affairs of money and business than men. But an individual woman may have a superior aptitude; if pointed out by the general wish of the relations, she ought to have the preference.

ARTICLE XIV. *In defect of a male heir of full age, the property shall be intrusted to the guardian of the oldest male heir, reserving a discretionary power as in the preceding article.*

ARTICLE XV. *The succession which falls to the treasury, for want of natural heirs, shall also be sold at auction.*

The government is incapable of managing specific property to advantage. The administration of such property belonging to a government costs much, brings in little, and is certain to undergo a rapid deterioration. This is a truth which Adam Smith has demonstrated.

This project of a law appears to be simple, precise, and easy to be comprehended; it gives little room for fraud, chicanery, or diversity of interpretation; and finally, it is analogous to the affections of the human heart, to those habitual inclinations which spring from the social relations; and therefore it is likely to conciliate both the affections of those who judge by sentiment and the esteem of those who appreciate reasons.

Those who accuse this plan of being too simple, and who declare that at this rate the law would no longer be a science, may find wherewith to be satisfied, astonished, and delighted, in the labyrinth of the English common law of successions.

To give the reader an idea of the English common law on this subject, it would be necessary to begin with a dictionary of new words; and presently, when they should discover the absurdities, the subtilties, the cruelties, the frauds, with which that system abounds, they would imagine that I had written a satire, and that I wished to insult a nation otherwise so justly renowned for its wisdom.

It is to be observed, however, that the right of making a will reduces this evil within tolerably narrow limits. It is only the succession to the property of intestates which is obliged to pass through the crooked roads of the common law. Wills in that country may be compared to arbitrary pardons, which correct the severity of penal laws.

TESTAMENTS

1st. The law, not knowing individuals, cannot accommodate itself to the diversity of their wants. All that can be exacted from it is to offer the best possible chance of satisfying those wants. It is for each proprietor, who can and who ought to know the particular circumstances in which those who depend upon him will be placed at his death, to correct the imperfections of the law in all those cases which it cannot foresee. The power of making a will is an instrument intrusted to the hands of individuals, to prevent private calamities.

2d. The same power may be considered as an instrument of authority, intrusted to individuals for the encouragement of virtue in their families and the repression of vice. It is true that this means may be employed for the contrary purpose; but, fortunately, such cases are an exception. The interest of each member of a family is, that the conduct of every other member should be conformable to virtue, that is, to general utility. The passions may occasion accidental deviations; but the law must be arranged in conformity to the ordinary course of things. Virtue is the dominant regulator of society; even vicious parents are as jealous as others of the honor and the reputation of their children. A man little scrupulous in his own conduct would be shocked to have his secret practices disclosed to his family; at home he is still the apostle of probity; he disregards it in his own behavior, but he wishes it in those about him. In this point of view, every proprietor is entitled to the confidence of the law. Clothed with the power of making a will, which is a branch of penal and remunerative legislation, he may be considered as a magistrate appointed to preserve good order in that little state called a family. This magistrate may be guilty of partiality and injustice; and as he is restrained in the exercise of his power neither by publicity nor by

responsibility, he would seem to be very likely to abuse it. But that danger is more than counterbalanced by the ties of interest and affection, which put his inclination in accord with his duty. His natural attachment to his children and his relatives is as secure a pledge for his good conduct as any that can be obtained for that of the political magistrate; to such a degree that, all things considered, the authority of this non-commissioned magistrate, besides being absolutely necessary to children of tender age, will oftener be found salutary than hurtful, even to adults.

3d. The power of making a will is advantageous under another aspect, as a means of governing — not for the good of those who obey, as in the preceding article, but for the good of him who commands. In this way the power of the present generation is extended over a portion of the future, and to a certain extent the wealth of each proprietor is doubled. By means of an order not payable till after his death, he procures for himself an infinity of advantages beyond what his actual means would furnish. By continuing the submission of children beyond the term of minority, the indemnity for paternal cares is increased, and an additional assurance against ingratitude is secured to the father; and though it would be agreeable to think that such precautions are superfluous, yet when we recollect the infirmities of old age, we must be satisfied that it is necessary not to deprive it of this counterpoise of factitious attractions. In the rapid descent of life, every support on which man can lean should be left untouched, and it is well that interest serve as a monitor to duty.

Ingratitude on the part of children and contempt for old age are not common vices in civilized society; but we must recollect that everywhere, more or less, the power of making a will exists. Are these vices most frequent where this power is most limited? We might decide the question by observing what passes in poor families, where

there is but little to give in legacies; but even that method of judging would be deceptive, for the influence of this power, established in society by the laws, tends to form general manners, and general manners thus formed determine the sentiments of individuals. This power given to fathers renders the paternal authority more respectable, and those fathers whose indigence does not permit them to exercise it, unconsciously profit by the general habit of submission to which it has given rise.

But in making the father a magistrate we must take care not to make him a tyrant. If children have their faults he may have his, and though we give him the power of correction, it does not follow that he should have the right to punish by starvation. The institution called in France a *légitime*, by which each child is protected against a total disinheritance, is a convenient medium between domestic anarchy and paternal tyranny. Even this provision the father should have the power of taking away, for causes specified in the law and judicially proved.

There is still another question. In default of natural heirs, shall the proprietor have the right of leaving his property to whomsoever he chooses, either to distant relations or to strangers? In that case the fiscal resource spoken of in the preceding chapter will be greatly diminished, it will apply only to the case of intestates. Here the reasons of utility divide. We must endeavor to find some middle course.

It may be said that, in default of kin, the services of strangers are necessary to a man, and his attachment to them almost the same as to relations. He should have the means of cultivating the hopes and rewarding the care of a faithful servant, and of softening the regrets of a friend who has watched at his side, not to speak of the woman who, but for the omission of a ceremony, would be called his widow, and the orphans whom all the world but the legislator regard as his children.

Again, if to enrich the public treasury you deprive a man of the power of leaving his property to his friends, do you not force him to spend it all upon himself? If he has no control over his capital from the moment of his death, he will be tempted to convert his property into a life annuity. It is to encourage him to be a spendthrift, and almost to make a law against economy.

These reasons are, doubtless, more weighty than any consideration of gain to the public treasury. We ought to leave the proprietor who has no near relations the right of disposing of at least half his property by will, while the other half is reserved for the public; and to be contented with less would, perhaps, in this case, be a means of getting more. Besides, it is a matter of very great importance not to attack the principle which allows every one to dispose of his property after death; and not to create a class of proprietors who will regard themselves as inferior to others, on account of the legal incapacity attached to one-half of their fortune.

All that has been said of alienations between the living, applies also to testaments. On most of these points we shall be instructed by the conformity between contracts and testaments, and sometimes by contrast.

CHAPTER XXXV

WHY ARE INCOMES UNEQUAL?—THE FACTOR OF INHERITANCE [1]

INCOMES FROM OWNERSHIP

Why do some people have property from which the owner can draw a large income without appreciable exertion on his own part, while other people have less such property, and many none at all? Here the principal cause clearly is the fact that all persons do not receive equal amounts of property by way of inheritance and bequest. Some receive enormous amounts and others small amounts, while the great majority receive nothing at all. Thinking of particular individuals we regard this as a matter of luck. It has always been thought simply lucky to be "born with a silver spoon in your mouth." The heir of a large property is "fortunate," and sometimes his property is even called his "fortune." But it is not chance which causes greater inequality from this cause to prevail at one time or place than at another. One set of conditions will produce more inequality than another.

Where there is not much property, there cannot be much inequality of inheritance. Consequently, under primitive

[1] [By Edwin Cannan: born, 1861; M.A., Oxford, LL.D., Glasgow; since 1897, lecturer at the London School of Economics; since 1907, professor of political economy at University of London.

His works include: "Elementary Political Economy" (1888); "History of the Theories of Production and Distribution" (1893); "History of Local Rates in England" (1896); "The Economic Outlook" (1912); "Wealth" (1914); "Money" (1918); "Coal Nationalisation" (1919); "The Paper Pound of 1797–1821" (1920).

The selection above reprinted is from his "Wealth" (London: P. S. King & Co., 1914), pages 182–189 (parts omitted).]

conditions the inequality from this cause is unimportant. Each generation then receives little from its predecessor, and the inequalities which arise from unequal inheritances are small compared with the inequalities which arise from the same cause when generation after generation has accumulated property in the shape of improved land, buildings, and instruments of all kinds. Hence, even in our own time we can see a difference between what we call the "old" and the "new" countries. The inequality which arises from unequal inheritance is much more marked in Europe than in North and South America or Australia. The American, H. R. Seager, said in 1904: "So long as a fair degree of equality of economic opportunity is preserved, the influences which make for the disintegration of large accumulations of wealth are likely to predominate, and the very rich men of each generation are likely to be those who have acquired the greater part of their fortunes during their own lifetimes. This has been the case in the United States up to the present time, and there is nothing in the practice of paying interest and rent for the use of property fairly acquired that threatens to make it less the case in the future." But in his 1913 edition he decided to omit this passage. As the United States ceases to be a "new" country, more and more property will be inherited in proportion to that which is acquired in the lifetime of a generation, and there will consequently be more scope for inequality of inheritance. Already the Astor and the Vanderbilt families show that the process of assimilation of American to European conditions has made considerable progress. America may be free from inequalities arising from grants of land made by William the Conqueror, but it is just as easy to be the lucky inheritor of a farm which becomes part of the site of a great city there as in England. The Astor inheritance in America has the same source as the Grosvenor inheritance in England, and the Vanderbilt and Morgan

millions are no more likely to "disintegrate" than those of the Rothschilds. We may take it that mere continuance of prosperity is likely to increase the inequality of incomes resulting from inequality of inheritance.

But variations of law and custom exercise an influence, and may exercise greater influence in the future. Primogeniture, strictly carried out, and applicable to the only important kind of property, no doubt kept the inequality greater than it would have been under a system of equal division between children. In our own time primogeniture plays but a small part: property as a whole is generally divided nearly equally between a man's children by his will, except when the eldest has a title, and, therefore, it is supposed, some state to support. The restrictions on freedom of disposition between the testator's children and others which prevail in many European countries probably exercise but little real influence, and merely compel what would almost always be done voluntarily. More important is the state of opinion about marriages between one class and another, which, in modern civilization, practically means between persons belonging to rich and persons belonging to poor families. If there is much intermarriage between the children of the rich and the children of the poor, there will clearly be a more equal distribution of inherited property than if the children of the rich marry none but their own class. Another most important factor is the relative number of surviving children among rich and poor. If every millionaire had twenty children, there would be much more "disintegration" of great fortunes than if he had only one or two. So far this subject has been very little discussed, and very little is known about it. J. S. Mill alone of the older writers thought it worthy of consideration, and not much has been added since his time. . . .

The second great cause of inequality of income from property is inequality of saving. Some save much,

others save little, and others nothing at all. If those who had little property saved much, and those who had much saved nothing, or exercised negative saving by spending more than their incomes, inequality of saving would, of course, not be a cause of inequality, but rather a cause tending to greater equality. But as a matter of fact it is the rich who save most, both in absolute amount and in proportion to their incomes, so that saving does not mitigate inequality arising from other causes, but aggravates it. If inequality in the desire to save were arranged so that those who had the least power to save had the most desire to do so, this might, of course, counteract to an appreciable extent the results of unequal power to save. But there is no reason for supposing any such providential distribution of desire to save, and therefore on the whole we must regard saving as actually operating to increase rather than decrease inequality of incomes. . . .

The third great cause of inequality of income from property is the fact that the income derived from particular property is liable to change from all sorts of causes which are beyond human foresight. If all property came to its possessors by inheritance, it is not clear that this liability to unforeseen appreciation and depreciation would increase inequality: if a number of persons are given unequal amounts by chance, and then some other chance disturbs these amounts, there is no reason for supposing that the second distribution will be more unequal than the first. But as a large amount of property is obtained by savings from earnings, and earnings are not altogether a matter of chance, but are largely subject to certain obvious rules, it follows that chance changes in the income derived from particular property do aggravate inequality. Two men earn equal amounts because they are of about equal ability and industry and work at the same trade: they save equal amounts, and invest with what good authorities would consider equal judg-

ment, but the investment of the one turns out fortunate and that of the other unfortunate. The one becomes rich and the other remains poor.

INCOMES FROM WORK

Why do some people receive large incomes in consequence of their performance of labor, others only small incomes, and others none at all?

This is not, as is sometimes erroneously said, all a question of value. Earnings differ not only because of differences in the value of a definite amount of service rendered by the worker, but also because of differences in the amount of the service rendered. It is obvious enough to all of us in private life that the comparative earnings of different individuals depend very largely on the comparative amount of labor which they perform. One man works hard, is "industrious" as we say, and earns a good annual income in consequence, another is lazy, rather enjoys being out of a job, and consequently earns very little. The only reason why this very important fact is often ignored in economic treatises is that it is so obvious that it does not occur to writers as worthy of mention. But it is not so obvious that the old do not find it constantly necessary to insist on it in their exhortations to the young. At one period they even thought it well to present boys with pocket-handkerchiefs on which the career of the industrious apprentice to the loftiest commercial position was depicted in lurid prints.

Differences of individual output of service may, of course, arise from other causes than differences of "industry." Individuals differ largely in the physical and mental qualities given them by nature, and we expect the more capable to earn more in each occupation than the less capable, where the more capable and the less capable are equal in "industry." Here again the only reason for overlooking the truth is its extreme obviousness.

But besides these differences between individuals following the same occupation, we find differences between whole classes of individuals following different occupations. There are low paid occupations and high paid occupations — or, at any rate, better paid occupations. The difference here cannot be entirely attributed to differences of "industry" and natural endowments. Some few of the worst paid occupations are, indeed, largely filled up by lazy persons of small natural ability, and possibly some of the best paid are largely filled up by persons of more than the average industry and natural endowments. But there is little reason for supposing that these propositions can be applied to all the poorly paid and all the better paid occupations. Most of them are filled by very ordinary persons. Moreover, even if the propositions did apply, that would not account for the difference of remuneration. . . .

CHAPTER XXXVI

THE SYSTEM OF COMPULSORY PARTITION OF ESTATES: ITS ECONOMIC AND SOCIAL CONSEQUENCES [1]

We have endeavored to sketch the traits that differentiate the family of yesterday from that of to-day.

Under the Old Régime the family was more stable, more solidly constituted. Rural land holdings were in a sense its main brace. The aristocracy was an aristocracy of land. Custom even more than the law tended to assure the preservation and the undivided transmission of the land, which continued a permanent source of protection for all the members of the family.

To-day the family is more mobile, less stable, and less rigidly constituted. It has seemed to us important to characterize the economic influences to which it has been subjected, and in the first place that of enforced partition. With each generation the land is divided. Will not this process of parcelling lead to the destruction of the family and of small ownership?

[1] [By Joseph Charmont: professor of law at the University of Montpellier, France.

His works include: "Le Droit et l'esprit démocratique" (1908); "La Renaissance du droit naturel" (1910); Les Transformations du droit civil" (1912).

The selection above reprinted is from the translation (by Layton B. Register) of his "Les Transformations du droit civil" (being Chapter iv of "Progress of Continental Law in the 19th Century": Boston: Little, Brown, & Co., 1918; Continental Legal History Series, Vol. XI), pages 4–7, 156–167 (parts omitted).

For a fuller account of the author's life and works, see the editorial preface to Vol. VII of this series: "Modern French Legal Philosophy" (1916).]

INFLUENCE OF ENFORCED PARTITION OF ESTATES

Enforced Partition of Estates. — Complex as our problem is, we remarked that there was need of viewing it under different aspects, studying independently each of the causes which may have determined an effect. Unfortunately social science accommodates itself ill to this method. . . .

We shall therefore employ this method with reserve. Mistrusting ourselves and it, we shall inquire what influence three facts, economic in their nature, may have had upon the status and condition of the family: enforced partition, the rise of the stock company, and the system of industrial labor.

According to Le Play's classification,[1] we may separate three principal types from the almost infinitely varied systems of inheritance. The legislator may exercise no constraint at all over the intent of the owner and leave him the right to choose freely the system of distribution that suits him. This is the system of *testamentary liberty*. Or, the State may intervene and regulate the transmission; the law will then obey one of two tendencies. It may aim to prevent partition of the estate, and endeavor by various means (right of the eldest son, exclusion of daughters, trust entails, the "majorat" [2]), to insure transmission to a single person. This is the system of *enforced conservation*. Or, it may prefer to divide the estate among a large number of persons rather than transmit it integrally. In this case the liberty of the owner is restrained in the interest of the heirs as a whole. This is the system of the *reserve* and the system of *enforced partition*, which, with all their differences, present one feature in

[1] "La réforme sociale" (6th ed.), Vol. I, chap. XVIII, par. 3, p. 252.

[2] ["Majorat," an institution of the early law, was a perpetual and indivisible trust in land in favor of the eldest of the family. *Cf.* Brissaud, "History of French Private Law," Continental Legal History Series, Vol. III (Boston, 1912), § 513. — TRANSL.]

common: they both exercise a constraint upon the owner's intent. But the action is exercised in different directions: one encourages the concentration, the other the parcelling of the property.

In adopting this classification, it should be observed that it does not precisely correspond to reality. Most legislations have not established any one of these three systems absolutely. The English system is one of testamentary liberty, though it borrows something from the system of enforced conservation, for in certain cases it preserves the right of the eldest son. Certain other legislations admit a fairly broad testamentary liberty without such liberty being complete. How may they be classified? We hesitate to say; in any event the classification must always be arbitrary. Le Play proposed that all countries be regarded as adopting the principle of testamentary liberty when they permitted a property holder, regardless of the number of his children, to dispose of at least one half his property. Consequently the system of enforced partition merely implied that the disposable portion was less than one half. This is the system of the French Civil Code, which established a disposable portion varying according to the number of the descendants.

Let us now examine the effects of this system, its advantages and its disadvantages. Enforced partition (said its greatest adversary, Le Play) is primarily a dissolving agent. It disorganizes the family, destroys small land ownership, and decreases the birth rate.

Operation of Enforced Partition. — To understand this institution, we must notice how it operates. Its action is not immediate; it is possible to arrest it for a certain time by custom or by evasion. Sustained by local tradition, peasant families endeavor to prevent the division of the inheritance. By agreement with all members of his family, the father transfers his land during his life to a chosen heir, charging him with the obligation of provid-

ing marriage portions for those who leave the family by marriage, or of aiding the others. But this customary influence cannot long endure. Many persons, by disposition or interest, arouse the envy or cupidity of the heirs. The father then comes to an understanding with his chosen heir and endeavors to benefit him without the knowledge of the other children. He has recourse to gifts, to disguised donations; in the partition, appraisals are made below the true value of the property. But such frauds are easy enough to discover as a rule. A disguised donation may be exposed, by any proof available; or a gift in partition may be revoked on the ground of fraud, even after acceptance; or a renunciation of successorial rights may be annulled. In these controversies, the final word rests with the law; and the time is near when, through fear of litigation, no one will longer dare to risk such difficulties.

Enforced partition is bound to produce its effects. There are several possible alternatives. By a sale among the co-owners or by amicable arrangement a single heir may retain the property and charge himself with the payment of parts in money to the others; or, the property is purchased by a third person, the heirs dividing the purchase price; or there is an actual partition of the land.

(1) An amicable arrangement appears very much the best means of safeguarding the unity of the family and the preservation of the estate. But the burden assumed by the heir who retains the property is so heavy that it is generally impossible for him to support it. As a rule, the heir who desires to retain the land does not measure his own strength. The affection he feels for the land causes an illusion as to its value. In many parts of France the basis of the capitalization of rural income is upon a rating of thirty-three to one (that is to say, the value of the land is estimated at thirty-three times its yearly revenue); this corresponds to an investment at three per cent for the

purchaser; thus, land returning 1000 francs is valued at 33,000 francs. In such a case, let us suppose that there are three children, and that the child retaining the land has already received during his life, as an absolute gift, the legally disposable portion of the estate; he will have to pay to his two brothers together 16,500 francs as their share in the partition.[1] How can he procure such a sum save by borrowing upon mortgage? He contracts the loan ordinarily at five per cent; but the notarial costs, revenue tax, and the charges for recording, which must be added, make it considerably more burdensome. Thus we have an instance of one obliged to pay out annually a sum roughly equal to the revenue from the land retained. It is only by a miracle that he succeeds in getting a living and meeting the interest. How may he hope to succeed by any amount of toil, in putting aside marriage portions for his children and in reimbursing the principal of his debt? The year comes when the debt falls due; the season has been bad, or some other misfortune has befallen; foreclosure is inevitable, with its customary train of expenses, humiliation, and, in a time of depression, the necessity of a sacrifice sale. This, then, is the end; to this he has come, as the years decline, — misfortune, long-suffering, overwork, his life a sacrifice.[2]

(2) Better certainly that he resign himself to the second method: an immediate sale of the land and division of the purchase price. This practice has prevailed in certain parts of France, notably in Normandy. As in the preceding case, so here, also, enforced partition leads to

[1] [In the example the testator would be legally allowed to dispose of one fourth. This he gives his chosen heir. The remaining three fourths go equally to the three children; here the heir gets one third; his whole interest being, therefore, one half. But as he takes in fact the whole property, he must pay his brothers one quarter each or 16,500 francs in all. — TRANSL.]

[2] *Cf. LePlay*, "La réforme sociale," Vol. II, pp. 212–225; C. Jannet, "Le socialisme d'Etat et la réforme sociale," p. 461. See also the investigations into the condition of families and the application of the inheritance laws, published by the "Société d'Economie Sociale."

the destruction of small rural land-holding. The heirs of the former owner fall to the rank of lessee-farmers or "metayers," or try their fortune in the cities.

(3) A last alternative remains: an actual division of the land. In appearance it is the simplest solution, but it is not the least unfortunate. The number of owners is increased, but the working of the land is rendered impossible. An agricultural establishment presupposes, in fact, buildings, animals, agricultural instruments, and a certain amount of land. The value and the utility of these different elements result from their union; they disappear when separated.

If the buildings are given to one heir, they will be out of proportion to the diminished operation, while the other heirs will fall into debt in erecting new constructions on their portions. A physical allotment of the home and dependencies creates other difficulties. It condemns persons, who are desirous of keeping their interests separate, to live together in a sort of ill-defined community-life, — a cause of inconvenience and a permanent source of friction and disagreement.

The same disadvantages ensue from a partition of the land. The division of the orchards, pastures, and fields, which were suited to the needs of a single family, places the owners in a condition of reciprocal dependence, renders the use of machinery impossible, and reduces part of the soil to unproductiveness by uselessly multiplying the number of fences and ways of access. Forced to seek additional income, the small land-owner hires out his services and so ultimately falls into the class of wage-earners. The fear of this descent from their economic class inspires parents in too many instances to adopt a deplorable means of prevention. Forbidden the right to favor the eldest child, a large family is avoided; families have but a single heir. In this way enforced partition exercises a depressing influence upon the birth-rate.

What value have the foregoing criticisms? They contain some truth, certainly, but also much exaggeration.

As to the birth-rate, it is well known how uncertain is the determination of the causes of its falling off. Many may be cited, which act together: the custom of the marriage portion; the high cost of living; increased luxuries and comforts; the encumberment of public offices and liberal professions (access to which, as it becomes more difficult, tends to raise the age of marriage); finally, surprising though it may seem, the want of emigration. Whatever may be the relative influence of these various causes, we are justified in thinking that the operation of the inheritance laws is in reality secondary. We need only note, first, that in certain countries where the system of the French Code is in force (in Belgium and in the Rhenish Provinces before 1900), for example, the birth-rate has not decreased; and, secondly, that the tendency to its decrease in France dates from a much earlier period than the adoption of the Civil Code. For a long time, notably from 1830 to 1846, the birth-rate of France almost equalled that of other countries of Europe.

Similarly the influence of the inheritance laws upon the destruction of small ownership has clearly been exaggerated. When the influences of the Civil Code are attacked as injurious, many things are forgotten. In the first place, equal partition existed in our early law in the case of persons beneath the noble class; testamentary liberty was not much greater than it is to-day. The legal share ("légitime") [1] was as a rule one-half, but in the case of certain property the law required a very large reserve. Thus a father might dispose of only a fifth of his separate estate. Most of the Customs did not admit of absolute gifts "inter vivos" in favor of a descendant who was an intestate heir. Finally, testamentary liberty was often

[1] [A Roman survival in the provinces of written law, providing a maintenance for the children out of the movables of the deceased, — TRANSL.]

curtailed by trust-entails. It must, then, be recognized that, in a general way, liberty is less restricted and more respected to-day than it was both under the Revolution and also under the Old Régime.

In the second place, there is every reason to believe that peasant ownership is not condemned to disappear. It represents about one-fourth of the land in France, and tends to increase, though rather slowly. At least it reëstablishes itself in proportion as the land is subdivided. Very gradually, the commercial class abandons possession of the soil and ceases to regard land as an investment. Land ownership no longer carries the social influence that it once did; the rise of movable wealth has created a great rival. More and more the exploitation of land is coming to require a present and enlightened attention. In this way, many large and medium estates have been parcelled among the peasants.

And, lastly, there appears no doubt but that equality among descendants is demanded as the only solution conforming to our notion of justice. The increase of the disposable portion might sometimes ease the situation of the favorite, but it would notably injure that of the other children. Suppose an inheritance of 40,000 francs, and five children; if one half be disposable, the favorite might get fr. 24,000, but each other child fr. 4000, or only one sixth as much. The school of Le Play, which advocates, as its special feature, a strong family organization, is unable to deny the fact that this condemns to separation all those children not permitted to live on the family estate. The chosen heir establishes himself on the land of his parents and lives as they did. But what becomes of the others? We need have no illusion that, in the present state of our society, they will consent to live with the eldest son in a position of inferiority which (as Cauwès says [1]), is in a way that of domestic servant, without

[1] "Cours d'Economie politique," Vol. III, p. 471.

wages and usually condemned to celibacy. Since they received only a diminished part and this in money, nothing attaches them any longer to the family lands. A life passed continually in the sight of the injustice which they believe they have suffered adds to the attraction of the cities and induces them to depart. Some, no doubt, succeed; but the majority go to swell the ever-rising wave of the indigent and fallen. We must, therefore, accept as a necessity the principle of enforced partition.

"*Hofrecht*," "*Homestead*," "*Arrondirung*." — Is it not possible at least to lessen these dangers? Numerous measures have been proposed to this end. Some aim to fortify the father's authority by different means; others to assure by law the preservation of the home and the stability of the family. To preserve the integrity of the home, an effort has been made to borrow from three institutions found in foreign legislations: the "homestead," the "hofrecht," and the "arrondirung," — the first employed in the United States, the two others in parts of Germany.

Under the name of "homestead exemption law," are designated those legislative acts the effect of which is to place the home and a certain extent of appurtenant land out of reach of creditors, and to subject their alienation to certain conditions tending to restrict the owner's right. In France the Act of July 12, 1909, authorizes the creation of a "family land" unattachable by creditors. Any land, not exceeding 8000 francs in value, may be constituted "family land." The creation is effected by a notarial declaration, a will, or gift. The creation of the "family land," which is subjected to a certain publicity, must be ratified by a justice of the peace and recorded within the month following the ratification. Prior creditors may preserve their rights by filing their claims. Subsequent creditors can attach neither the land itself or its fruits. The owner loses the right to mortgage it, while

preserving his right to alienate it, or to renounce the effect of the law within certain limits.

The "hofrecht" is an institution intended to facilitate the undivided transmission of rural property. Like the "homestead" it aids in the preservation of the estate, but instead of operating during the life of its creator, it produces no effect until his death. In certain parts of Germany, notably Hanover, the farm ("hof") is not divided among the descendants; it is given as a whole to a favored heir called "anerbe." Certain laws give the father the right to designate this heir. Others leave the choice to the children and, in case of disagreement, to the "family council." Most laws expressly name the eldest son, and in the absence of sons, the eldest daughter; a few, on the other hand, favor the youngest. Ordinarily the system of the "hof" is conditioned upon a declaration of intention by the father; he must make his purpose known by describing the property which he would exempt from partition upon a special register called the "hofrolle." The German Civil Code has allowed these local particularities to survive in the law of rural inheritance, leaving it to the States of the Empire to legislate upon the matter.

Lastly, "arrondirung," or enforced exchange, proposes to prevent an excessive division of land. It is a means by which the administrative power of the government unites in one whole all the lands of a municipality, and then allots to each proprietor an unbroken domain corresponding in value to the numerous and scattered lots which had previously belonged to him.

Without discussing these institutions, we admit that the reforms seem to us difficult of application or but slightly effective. There was a time when much interest centered in the "homestead." The article by Paul Bureau, the reports and notices of Levasseur,[1] and the discus-

[1] "Académie des sciences morales," Vol. XLII (2d half, 1894), p. 558.

sions by the "Société d'Economie Sociale,"[1] have shown beyond doubt that the enthusiastic partisans of this institution had many illusions about it. The reform runs the risk of being illusory if restricted, as in the French Law of 1909, to declaring the property unseizable, without taking from the owner his right of alienation. If the law goes so far as to declare an absolute inalienability, it opens the way to very serious disadvantages. A sort of marriage portion system is created, extending to the property of the husband, which deprives the very person whom it is intended to protect of credit and initiative and every sense of responsibility, and yet renders the services of the lawyer more indispensable and onerous.

The "hofrecht" would arouse in our country those protests that have always been provoked by efforts to restore the right of the eldest son. Experience proves that this system is only possible when it conforms to tradition and is acceptable to general opinion.

Finally, the system of enforced exchange may be possible in Germany where the people are accustomed to a patriarchal form of government and where the idea of collective ownership has left important traces. We need but little acquaintance with the French peasant to estimate the resistance that such a measure would surely excite amongst us.

Restoration of Parental Testamentary Power. — We shall not delay long over the study of the numerous projects which have aimed to restore the authority of the father. We may say, without enumerating all, that they consist chiefly in enlarging the disposable portion of the estate, in granting the liberty to effect family arrangements, and in the reëstablishment of disinheritance.

(1) *Enlargement of Disposable Portion.* — We have already discussed the problem of enlarging the disposable portion. The reform would seem futile, were it possible;

[1] "Réforme sociale" (2d half, 1894), pp. 71 and 226.

for the disposable portion is no longer taken advantage of to-day. The ideal of equality has so entered into our customs that the father would not exercise the powers given him. In addition, the reform is impossible, because it is too manifestly contrary to public sentiment. A democracy founded on equality will always pronounce consistently against such a measure. As Laveleye said,[1] there is incompatibility between democracy and the testamentary power.

(2) *Liberty of Family Arrangement.* — Under the rather vague title of "liberty of family arrangement" is understood the power given the father, on leaving to his children an undivided reserve, to take all the necessary precautions to secure an easy regulation of his succession.

With this object the Civil Code introduced partition by the ascendant, permitting the father to effect the distribution of his property by donation or will. Much was hoped of this institution. It was thought that in many cases the disadvantages inherent in the law's partition of an inheritance would be avoided. This hope has too often proved vain.

Instead of insuring the comfort of the last years of the parent who has despoiled himself during lifetime for his children's benefit, his partition abandons him to their ingratitude. The heart-breaking situation of the peasant who has distributed his property and is reduced to beg for the modest income, reserved to himself but unpaid, or who (and this is indeed worse) must support the bitterness and humiliation of a life in common with them, has often been described. It is unfortunately not the exception.

And at the same time, it seems that, far from avoiding litigation, a distribution by the parent is best fitted to excite it. We may judge of this by the number of cases to which it has given rise and by the important space

[1] "Le gouvernement dans la démocratie," Vol. I, bk. VI, chap. XII, p. 307.

that it always occupies in the law reports. We have to recognize that, in the actual state of legislation and decisions, this mode of partition offers no security. No matter with what good faith it is performed, it does not escape the risk of being invalidated. A consequence is the ruinous expense of lawyers' fees, the failure of credit in the donor, or the destruction of the rights of third persons.

Of the two evils pointed out, the first results from the institution itself, whatever its mode of organization. It has ever been a subject of criticism, but it will not be by reforming the law that the evil will be remedied. The legislator has done everything possible by subjecting distribution "inter vivos" to the ordinary grounds for revocation of gifts, that is, ingratitude and failure to carry out the attaching trusts. The rest must be a reform in conduct.

The second evil is avoidable. But the courts seem to have set themselves to aggravate it. . . .

All these causes of uncertainty may be directly ascribed not to the law itself, but to the manner of its application. As it is hardly possible to look for a change of view by the courts, the demands of Le Play's school of publicists, who have insistently sought legislative reform, seem to us wholly justified.

Would it not be preferable to go still farther and (with Claudio Jannet) abolish the rescission of contracts affecting a future inheritance and permit the heir to the reserve, at the will of the decedent, to be allotted a reserve consisting of specific property or money? A contract affecting a future inheritance, said Jannet, may be useful in facilitating the marriage of daughters or in encouraging emigration. "A sum of money, given twenty or thirty years before a parent's death, has far more value to a newly established household or to the emigrant than a right of inheritance, the realization of which is distant

and uncertain." [1] We are tempted to believe that a gift given as an advance adequately satisfies such needs. The practice of renouncing rights of inheritance has left such unpleasant recollections, and encouraged so many odious calculations, that its reëstablishment seems in no way desirable.

On the other hand, we could not see without apprehension the introduction into our law of the principle of the German Civil Code, by which the reserve is demandable, not in specific property, but in value. Is it not practicing a sort of exclusion of a child to treat him not as an heir but as a creditor who is got rid of with a little money? Would it not suffice to recognize a father's right to allot to each child the portion which seems most suitable? For the legislator, the problem consists, therefore, not in abolishing the distribution "inter vivos," but in simplifying it and rendering it less onerous. We regard as very fortunate from this point of view the partial reform introduced by the Law of November 30, 1894, governing tenements for the poor. That law puts a limitation upon the rule that each heir may always demand immediate partition. It permits the allotment of the house, after appraisal, to the surviving husband or wife, or to one of the heirs, even if there are among them persons lacking legal capacity.

(3) *Disinheritance.* — One of the severest criticisms directed against the rule requiring a reserve is that it releases the son of all obligation of respect or gratitude, by vesting him, regardless of his behavior, with the certainty of some day coming into his parents' fortune. He may with impunity neglect all his duties toward them, use them in the basest manner, humiliate them shamefully; but it matters not; he remains their heir.

The sole means of ending this scandal is to reëstablish some of the causes of disinheritance recognized by the early law. The draft of the Civil Code preserved disin-

[1] "Le socialisme d'Etat," p. 475.

heritance in a certain measure, by permitting at least an (unsanctioned) exclusion of children that were "notoriously dissipated"; and there are still several text-writers, among those who defend the reserve, who are not hostile to the principle of disinheritance for cause.

We believe that it would be at least desirable to increase materially the number of instances where an heir might be legally declared disqualified to inherit. Several causes of disinheritance recognized by foreign codes [1] could be transformed into disqualifications to inherit. They would perhaps be the condition and consequence of marriage reform; while freeing it from family pressure, while releasing the son from the necessity of having the parents' consent, the latter would be allowed to leave him nothing.

Our conclusions may appear very modest in their recommendations. We do not claim that we envy nothing of the past, but we do believe that it cannot be revived.

The family has felt very deeply the influence of those principles of equality and liberty that have modified society itself; and that is why the question of testamentary liberty has always been considered a political question in France. Many measures, in themselves good, but having, or appearing to have, as their object, a return to early family organization, would meet with unpopularity and provoke an irresistible current of opinion against them.

[1] Civil Codes, Spain, Art. 853; Portugal, Art. 1876; Germany, Art. 2333; Switzerland, Art. 477.

CHAPTER XXXVII

FREEDOM OF BEQUEST, FROM THE INDIVIDUALISTIC POINT OF VIEW [1]

§ 1. To many Englishmen at the present day the right not only of *distributing* one's wealth after death, but of ordering the details of its use for all time, seems to be naturally and almost necessarily included in the Right of Property, — that is, unless the wealth has been given or bequeathed to the owner under special limiting conditions. In fact, however, the right of free bequest is of comparatively late growth in the development of society. As Maine has pointed out,[2] "in all indigenous societies a condition of jurisprudence, in which testamentary privileges are not contemplated," precedes that in which free testation is permitted; and even in medieval law we find that liberty of bequest was at first closely limited by the rights of the testator's widow and children. The power of diverting the whole of a man's property from the family, or of distributing it quite capriciously, is not older than the later portion of the Middle Ages. "When modern jurisprudence first shows itself in the rough," wills are rarely allowed to interfere with the right of the widow to a definite share, and of the children to certain fixed proportions, of the common inheritance. And similar restrictions are actually maintained in the French Civil Code and several other legal systems; partly owing to the remarkable

[1] [By Henry Sidgwick. For a biographic statement, see page 32, ante

The selection above reprinted is chapter VII (parts omitted) of his "Elements of Politics" (Macmillan & Co., 1891).]

[2] "Ancient Law," p. 177.

persistence of the older view of family right — when so much of less ancient origin was swept away in the revolutionary era — but partly, no doubt, from the desire to prevent the inequalities resulting from primogeniture.

I have allowed myself this brief historical digression, because it is almost required to explain the peculiar position which this point in the individualistic scheme occupies at the present day.

Freedom of Bequest, on the one hand, has not completely emancipated itself from the old traditional restraints in the interest of the family; and, on the other hand, it is assailed by new limitations, proposed in the interest of the community. Now we have before seen that Bequest occupies a somewhat different position from other rights included in our common conception of the Right of Property, when the question of allowing it is treated on purely individualistic principles: since the consideration of it seems *prima facie* to lead us to an "antinomy" — a pair of irresistible arguments on opposite sides of the question. From a utilitarian point of view, indeed, the encouragement that the right of bequest gives to industry and thrift seemed to be a decisive consideration in favor of allowing it. This consideration, however, though decisive in favor of *some* freedom of bequest, does not clearly negative the imposition of greater restrictions on bequests than we think it expedient to impose on a man's power of transferring property during his life. An individualist, therefore, may admit such restrictions, in the interest either of the testator's family or of the community, without a palpable abandonment of his fundamental principle.

§ 2. Let us then consider first restrictions in the interest of the family, as being the older: and, for the sake of definiteness, let us suppose such a plan of restriction as that adopted in the French code. Suppose that a man's property, if he has three or fewer children, is ideally

divided into equal shares exceeding by one the number of his children, only one of which he is free to bequeath away from them: while, if he has more than three children, he is free to bequeath away from them one-fourth of his property, but no more; as regards the rest, he cannot deprive any child of its equal share, except for special causes judicially proved.

The objection to such a measure seems to be that, granting it to be desirable that a man's property in a general way should go to his children, the testator evidently has special means of ascertaining his children's wants and deserts; so that any variations from equality of distribution which he may be induced to make, if free bequest is allowed, are likely on the whole to correspond to variations either in their wants or their deserts. On the other side it is urged that the disinheriting of children is liable to give a painful and undeserved shock to reasonable expectations: and no doubt cruel disappointments may thus be caused. But similar mischief may be done in other cases by the tacit encouragement, without any definite and provable promise, of expectations of gift, bequest, or other aid: and in such cases it is generally recognized that the repression of wrong must be left to morality, since law can only protect expectations arising out of definite and demonstrable engagements. And if it be thought that in the present case some special legal interference is needed, owing to the strong support that common opinion gives to the expectations of children to inherit their parents' wealth, it would be easy to prevent the shock of disappointment by requiring a parent who wished to retain his freedom of bequest to notify this to his children before they attained a certain age. The real issue therefore is not whether the disappointment of expectations of inheritance should be prevented, but whether the law should intervene to create such expectations. I know no adequate justification for such inter-

ference, so far as it provides that a number of human beings, after being properly educated, shall not have to depend on their own exertions for subsistence: but it is expedient to secure to all children support and proper training until they can provide for themselves, and it appears to me to be in harmony with the individualistic principle to limit the power of bequest so far as is necessary to secure this result.

§ 3. So far I have considered the bequest simply as having the effect of dividing the property among children — or other persons — who receive it in complete ownership. Suppose, however, that a child or grandchild is an infant at the parents' death; it is obvious that the property must be given to some one to hold in trust for it. We thus introduce the notion of *fiduciary* as distinct from *beneficiary* ownership; in which the management of property is separated from the enjoyment of it. The necessity for such trusts in the case of young children is manifest; but when we consider the expediency of allowing fiduciary ownership to be extended beyond what is required for this purpose — as (*e.g.*) by permitting parents to pass over children and bequeath property to be held in trust for descendants yet unborn — the conclusion, from our present point of view, is more doubtful. On the one hand — besides the general argument for freedom of bequest — there would in some cases be a difficulty in arranging the succession to property in accordance with the testator's view of the needs and deserts of his descendants, unless such remote trusts were allowed. On the other hand, fiduciary ownership involves the drawback that a trustee cannot be expected to be as much interested in the management of property as an ordinary owner would be: while, if he is controlled by conditions imposed by the testator, there is the further objection that the testator's foresight of the future is limited, so that after his death an arrangement manifestly undesirable may be legally

unalterable. This latter objection applies with especial force to property left to public objects: if the testator's design is carried out it may become worse than useless, owing to change of circumstances, even when it was originally well conceived.

Similar questions arise as to the expediency of allowing ownership that is not fiduciary, but limited in time or restricted by conditions, to be created by bequests, — or by any legal act that continues to take effect after the death of the person imposing the limitations or conditions. *E.g.*, when a man thus becomes an owner of land for life only, he is likely not to have sufficient inducement to apply capital in improving the land; and the inalienability necessarily involved in such life-ownership may keep the land in the hands of a person who has neither skill nor capital to deal with it in the best way.

These and similar difficulties are only particular cases of the general theoretical difficulty that besets the individualistic system — even when interpreted in a completely utilitarian sense — if it is taken to include freedom of bequest. Granting that men in general will extract most satisfaction out of their wealth for themselves, if they are allowed to choose freely the manner of spending it, it obviously does not follow that they will render it most productive of utility for those who are to come after them if they are allowed to bequeath it under any conditions that they choose. On the contrary, it rather follows from the fundamental assumption of individualism, that any such posthumous restraint on the use of bequeathed wealth will tend to make it less useful to the living, as it will interfere with their freedom in dealing with it. Individualism, in short, is in a dilemma. The free play of self-interest can only be supposed to lead to a generally advantageous employment of wealth in old age, if we assume that the old are keenly interested in the utilities that their wealth may furnish to those

who succeed them: but if they have this keen interest they will probably wish to regulate the future employment of their wealth; while, again, in proportion as they attempt this regulation by testament, they will diminish the freedom of their successors in dealing with the wealth that they bequeath; and therefore, according to the fundamental assumption of individualism, will tend to diminish the utility of this wealth to those successors. Of this difficulty there is, I think, no general theoretical solution: it can only be reduced by some practical compromise. Thus the creation of fiduciary ownership for the benefit of young children may be limited by requiring the children to be living when the bequest takes effect, or born within a certain period after that date. Again, the general disadvantages of fiduciary management, and of management by a limited owner — which have been specially noted in the case of land — may be minimized by securing to the trustee or life-owner an inalienable right of selling the land or other property, provided he invests the proceeds of the sale in securities of a certain class. Finally, in the case of trusts for public uses — usually of a permanent kind — it is desirable that the government should have a general power and duty of invalidating useless or mischievous bequests; and of revising and modifying the employment of the funds bequeathed, after a certain interval of time or after any important change of circumstances.

§ 4. The restrictions on free bequest, which the discussion in the preceding section has led me to propose, are such as English legislation has long recognized as expedient. But limitations of a much more sweeping kind have often been recommended by thinkers who would have shrunk from interference with any other of the rights commonly included in our conception of the right of property; and, in particular, by the influential utilitarian writers on whose work the present treatise is chiefly

based. In 1793–5, Bentham proposed — in connection with an "extension of the law of escheat," of which I will presently speak — that, in case of failure of near relations, the power of bequest should only extend to half the testator's property.[1] Half a century later J. S. Mill[2] stated that were he "framing a code of laws according to what seems best in itself," he would "prefer to restrict not what any one might bequeath, but what any one should be permitted to acquire, by bequest or inheritance. Each person should have power to dispose by will of his or her whole property; but not to lavish it in enriching some one individual" — even a near relation — "beyond a certain maximum, which should be fixed sufficiently high to afford the means of comfortable independence." It appears to me, however, that any interference with free bequest, so serious as that contemplated in either of these proposals, would dangerously diminish the motives to industry, and — what is here, perhaps, more important — thrift, in the latter part of the lives of the persons who came under the restrictions. Moreover, any interference running strongly counter to the natural inclinations of such persons would be likely to be extensively evaded by donation before death.[3] Probably all that can be safely attempted in the way of limiting bequests in the interest of the community — beyond the regulations proposed in the preceding paragraph — is a tax on inheritance, considerably increased when bequests are received by others than near relations.

[1] It ought to be said that in the "Traités de Legislation," published by Dumont in 1802, from Bentham's MSS., this restriction is only suggested in a doubtful and hesitating manner. — See "Principes de Code Civile," part II. ch. IV.

[2] "Political Economy," book II, ch. II. § 4.

[3] This is admitted by Mill, who consequently thought that "the laws of inheritance have probably several phases of improvement to go through before ideas so far removed from present modes of thinking will be taken into serious consideration." — "Political Economy," book V, ch. IX, § 1.

CHAPTER XXXVIII

MODERN LIMITATIONS ON LIBERTY OF TESTATION [1]

THERE is probably no institution of private law concerning which there has been more discussion in the modern world than the will. Only recently one of the leading legal scholars of England has spoken of "the more doubtful justification usually put forward for its maintenance." [2] On the other hand, Sir Henry Maine places the will by the side of the contract as one of "the two great institutions without which modern society can scarcely be supposed capable of holding together." [3] If the writings of older writers are examined, we find an equal divergence of opinion as to the justification and theory of testamentary disposition. Leibnitz connects the institution with the doctrine of the immortality of the soul.[4] Grotius finds for the testament a basis in

[1] [By ORRIN K. MCMURRAY: born at San Francisco, Calif., Nov. 25, 1869; Ph.B. (1890), University of California; LL.B. (1893), Hastings College of Law; assistant professor, associate professor, professor of law, School of Jurisprudence, University of California, 1903– .

The selection above reprinted is from his essay entitled "Liberty of Testation and Some Modern Limitations Thereon," first published in Illinois Law Review, XIV, 96–123 (Wigmore Celebration Legal Essays; Chicago: Northwestern University Press, 1919, pages 536–563) (parts omitted).]

[2] Jenks, "English Civil Law," Harvard Law Review, XXX, 119.

[3] Maine, "Ancient Law" (Pollock's ed.), 214–215.

[4] "Testamenta vero mero jure nullius essent momenti nisi anima esset immortalis. Sed quia mortui re vera adhuc vivant, ideo manent domini rerum, quos vero heredes reliquerunt, concipiendi sunt ut procuratores in rem suam": Leibnitz, "Nova Methodus Discendæ Docendque Jurisprudentiæ," part II, § 20. His view is adopted by Ahrens, "Cours de droit naturel," 7th ed., II, § 102.

natural law, and supports the law of intestate succession by reason of its agreement with the presumed will of the owner.[1] He would therefore allow the freest power of testamentary disposition, beyond a reasonable amount reserved by law for the support of children. Pufendorf, whom our own Blackstone follows, finds the will merely to be a contrivance of positive law, not as Grotius thought founded in natural law. To him, however, as to his predecessor, the law of descent and succession is the expression by law of the presumed will of the owner.[2] The notion that the testament is a means of transmission of private ownership from the testator to his beneficiaries is the starting point for the theories of the jurists of the seventeenth and eighteenth centuries. From the right of the individual to transfer his property during his lifetime is deduced the right of testamentary disposition. Writers of this school are therefore disposed to approach the will from the point of view of conveyancing — the viewpoint of the English law. They regard intestate succession as a substitute for the will, what the decedent would have expressed as his will, had he made one.[3]

With the French revolution, these theories are greatly altered. "What is a testament?" exclaims Mirabeau. "It is the expression of the will of a man who has no longer any will, respecting property which is no longer his property; it is the action of a man no longer accountable for his actions to mankind; it is an absurdity, and an absurdity ought not to have the force of law."[4] It would be difficult to find in the annals of legal debate a more

[1] "Ex coniectura voluntatis naturalem habet originem": Grotius, "De Jure Belli ac Pacis," II, c. 7. See the description of the natural law theory of testamentary succession in Maine, "Ancient Law," 190.

[2] "Inventum juris positivi": Pufendorf, "De Jure Naturae et Gentium," III, cc. 10, 11; Ahrens, ubi supra.

[3] Bruns, "Über Testirfreiheit und Pflichttheil," Zeitschrift für Vergleichende Rechtswissenschaft, II, 159, 166, reprinted in "Kleinere Schriften," II, 139.

[4] "Discours sur l'égalité des partages," translated in Bulwer, "Historical Characters," I, 114. Cf. Montesquieu, "Esprit des Lois," 26, 6, 15.

dramatic scene than the reading by Talleyrand of this eloquent address before the National Assembly on the 2d of April, 1791. The author, himself the disinherited victim of an arbitrary father, lay still in death, while his voice as from the grave inveighed against the power of testamentary disposition as contrary to the dictates of humanity.[1] And there can scarcely be found a better example of the folly of a purely rationalistic treatment of a great and ancient legal institution than is afforded by the fact that Mirabeau made a death-bed will on the very morning of the day that Talleyrand read his "testament politique."[2] The same inconsistency has been charged to Plato, who like Mirabeau criticized the will, and like him died testate.[3]

If the preference for testamentary freedom expressed by Grotius and the natural-law school tends to class the will in the field of property law, the theory which denies that freedom throws the institution into the field of family law. A philosophical expression of the latter view is found in Hegel, to whom the family is the basis for the entire law of succession. Practically he would deny liberty of testation where there are a wife and children, and would permit it only where there is no widow and no immediate descendants or ascendants.[4] In positive legislation, Mirabeau's views found expression in the short-lived act of the National Convention of 1793 which absolutely denied the right to make a will where there were descendants or ascendants.[5]

Later philosophical jurists of the natural-law school

[1] Boissonnade, "Histoire de la réserve héréditaire," 494, 559.

[2] Boissonnade, 60.

[3] Diogenes Laertius, "Plato," cited by Boissonnade, 60.

[4] Hegel, "Philosophie des Rechts," §§ 178–180, "Works," VIII, 234.

[5] Decree of March 7, 1793, cited in Boissonnade, 356–357. This was very soon altered by the decree of 5 Brumaire, in the year II, which permitted one-tenth of a testator's property to be disposed of by will as against descendants or ascendants and one-sixth as against collaterals: Brissaud, "History of French Private Law" (Continental Legal History Series), 747.

have not added to clearness of thought concerning inheritance and testamentary succession. One can scarcely avoid an expression of impatience at such a justification as that of Ahrens, who declares that "to refuse a man the right to make a will, is to treat him solely as a being of the senses, incapable of conceiving an object beyond this life, or to make him a living example of the maxim, après moi le déluge." [1] And one breathes a sigh of relief when he finishes reading such explanations as those of Trendelenburg and Lasson who square their philosophy of law with existing facts of German legislation.[2] Indeed, the value even of the earlier speculations of Grotius and Pufendorf is not because of their inherent merit, but for the reason that they have profoundly influenced the actual course of development of legal institutions. The theory of a law of nature was partly, though not consistently, adopted by Blackstone, and through him has affected current legal thought in the English-speaking world.[3] In fact, it is possible to some extent to trace the direct influence. The first chapter of the Commentaries is in large part textually a translation from Burlamaqui.[4] And the distinction made in the first chapter of the second book of Blackstone between the right of property arising from occupancy, designated as a natural right, and the right of succession, defined as a mere creature of positive law,[5] is doubtless borrowed from Pufendorf to whom Blackstone refers not only in this chapter, but in that on Title by Testament.[3] Difficult as it is to perceive an essential distinction of the sort made in this matter, it has been adopted by most American courts, including

[1] Ahrens, II, 301.

[2] Trendelenburg, "Naturrecht auf dem Grunde der Ethik," § 141; Lasson, "Rechtsphilosophie," § 54, 14.

[3] On the influence of Grotius, Pufendorf, and Burlamaqui upon Blackstone see Glasson, "Histoire du droit et des institutions de l'Angleterre," V, 399.

[4] Glasson, ubi supra.

[5] Blackstone, "Commentaries," II, 8, 490.

the Supreme Court of the United States,[1] as a legal basis for sustaining the constitutionality of taxes on succession, and has become a commonplace of legal discussion. Statesmen and legislators as well as lawyers profess to be dominated by the theory of Pufendorf. Thus, Sir William Vernon Harcourt, introducing a bill for the imposition of death duties in Parliament, says: "Nature gives a man no power over his earthly goods beyond the term of his life; what power he possesses to prolong his will beyond his life — the right of a dead hand to dispose of property — is a pure creation of the law, and the state has the right to prescribe the conditions and the limitations under which that power shall be exercised." [2] The direct corollary of such a proposition is that the right of property itself is not a creation of positive law, but owes its existence to something beyond society. A theory so out of keeping with modern conceptions of the relation of the community to the individual, with social and economic needs, must seriously confuse legal thinking. . . .

Viewed from the standpoint of the history of legal ideas the first phenomenon that impresses the observer is that the will is by no means a universal institution.[3] It was unknown to the early Greek law, as we find it in the laws of Gortyn.[4] It was also unknown to the ancient law of India, to Egypt, to the older Jewish law, to the law of Babylon, modern as that law seems in many respects as presented in the code of Hammurabi.[5] Tacitus' descrip-

[1] *Magoun v. Illinois Trust, etc., Co.* (1898), 170 U. S. 283, 292.

[2] Quoted by Fly, "Property and Contract in Their Relation to the Distribution of Wealth," I, 416.

[3] Girard, "Droit Romain," 4th ed., 789, note 4; Bruck, "Zur Entwicklungsgeschichte der Testamentsvollstreckung im römischen Recht," Zeitschrift für das Privat und Öffentliche Recht, XL, 545; Post, "Grundriss der Ethnologischen Jurisprudenz," II, 197.

[4] Wigmore and Kocourek, "Sources of Ancient and Primitive Law," 453–464; Post, "Anfänge des Staats und Rechtslebens," 149.

[5] As to India, see Post, "Grundriss," i. 197; Egypt, Revillout, "La propriété en droit égyptien," 152, 201; Hebrews, Dareste, "Etudes d'histoire du droit," 3, 47; the laws of Hammurabi, Wigmore and Kocourek, "Sources," 387 *et seq.*

tion of the early Germans[1] has been verified by what modern investigators have learned of the early Germanic law.[2] Professor Hübner says: "The very nature of the Germanic law of inheritance as a law of kinship based exclusively upon blood relationship, necessarily wholly excluded, originally, testamentary dispositions of the estate."[3] The Frankish "affatomie" and the Lombard "thinx" or "gairethinx" were essentially herital contracts, bilateral transactions, not like the will, unilateral and revocable.[4] Moreover, these institutions, primitive as they are, had been exposed to the influence of the clergy and of the Roman civilization which began to operate at a very early date upon the barbarian customs.[5] . . .

The testimony of the customs of peoples less closely connected with European civilization than those just mentioned confirms the conclusion that the law of intestate succession is older than that of testamentary disposition, and that the will is a comparatively modern institution.[6] . . .

Side by side with the herital contract and the post obitum transfer, sometimes independently and sometimes merging with them, we find the system of adoption employed as a substitute for the will. China, the older Japan, ancient Egypt, the early Magyars, illustrate this custom.[7] The laws of Gortyn, the Attic and Spartan systems, the testamentum calatis comitiis of the early Roman law, all exhibit institutions whose purpose is the perpetuation of the personality of the deceased through

[1] "Germania," c. 20; Wigmore and Kocourek, "Sources," 106.

[2] Hübner, "History of Germanic Private Law" (translated by Professor F. S. Philbrick in Continental Legal History Series), 697.

[3] Hübner, 740.

[4] On the unilateral character of the will see Bruck, Zeitschrift der Savigny Stiftung für Rechtsgeschichte (Röm. Abt.), XXXII, 355, and Hübner, 744.

[5] Goffin, "The Testamentary Executor in England and Elsewhere," 14.

[6] Maine, "Ancient Law," 190, 211; Bruck, Zeitschrift für das Privat und Öffentliche Recht, XL, 545.

[7] Post, II, 198.

the creation of an artificial kinship.[1] Usually the act of adoption in its earliest form is sanctioned by a general anachronism to speak of legislation in connection with assembly, or by the members of the group; were it not an early law, we might term it a legislative act. As a rule, it is permissible only where the adopter is childless, and its purpose is closely connected with the performance of religious duties.[2] The Germanic laws, though they sometimes sanctioned adoption — which, however, never obtained a footing in the Anglo-Saxon branch — did not sanction it for the purposes of inheritance. Their maxim was, "Gott, nicht der Mensch, macht den Erben," or in the Latin phrase, "solus Deus heredem facere potest, non homo." . . .

If we follow the varying fortunes of the last will and testament through one of the European systems, we cannot fail to observe how the institution has in part been consciously remodeled to suit the varying conditions of society, how in other respects it has been affected by external events which we can scarcely regard as other than accidental, but how upon the whole it has retained the original character imposed upon it by its origin. The familiar history of the will in England may well serve as an

[1] On the laws of Gortyn, see Wigmore and Kocourek, "Sources," 462 — "And if (the adopted) take over all the goods and there dwell (?) not with him natural children, he shall perform the divine and human (duties) of the adopter and take them on himself as is written for natural children. And if he will not to perform them as is written, those belonging shall have the goods. But if there be natural children to the adopter, with the males (shall share) the adopted as the females have allotted to them from their brothers; and if there be no males, but females, the adopted (male) shall have an equal share; and he shall not be obliged to perform the duties of the adopter and to take to himself the goods, whatever the adopter have left; and more the adopted shall not come to." The reference to the adopter's right to renounce points to a question concerning which students of Greek law have differed, namely, whether children could renounce their inheritance: Dareste, "Nouvelles Etudes d'histoire du droit," 88–90. On the relation of adoption to testamentary law in Greece, see Beauchet, "Histoire du droit privé de la république athénienne," III, 691–697; in Rome, Sohm, "Institutes of Roman Law," translated by Ledlie, 3d ed., 542; Girard, "Droit Romain," 4th ed., 797; Maine, "Ancient Law," 210.

[2] Fustel de Coulanges, "La cité antique," doubtless has exaggerated the religious influence. *Cf.* Von Jhering, "Die Vorgeschichte der Indo-Europäer," 62–71, for a criticism of Fustel de Coulanges.

illustration. So early as the ninth century, we read how a man who died and then returned to life, divided his belongings into three parts, one of which he sold ("sealde") to his wife, one to his children, and the third, which fell ("gelamp") to himself, he divided among the poor. This was evidently an example of the post obit gift of the Germanic law, and modern legal historians concede that the ambulatory will was unknown before the Conquest.[1] It was scarcely recognized and enforced by the ecclesiastical authorities before the king's courts are condemning not only the will of land but all post obit dispositions thereof. Because the last will was usually made in articulo mortis, because a decedent should make some provision for his soul by bequests to the poor and to the church, the jurisdiction over wills was naturally assumed by the clergy, and by the thirteenth century they had established that monopoly in ecclesiastical courts over wills of chattels which existed until the abolition of their jurisdiction in civil matters in 1856.[2] . . .

Rules of inheritance soon became universalized in a most singular fashion, especially under the influence of a specialized legal profession. Primogeniture, for example, is extended from the direct line, where the exigencies of military service may have served as an excuse for its existence in providing able-bodied soldiers, to collateral lines where the reason becomes less apparent. What excuse, again, can be given for the rule which remained in English law till 1833 that land may descend ad infinitum, but may in no case ascend?[3] It looks as if the mind, in evolving such a rule, were merely applying analogies from the laws of physics. Indeed, many of the

[1] Jenks, "Short History," 61. This does not apply to privileged persons. Cf. Decree of Pope Alexander III, Nouvelle revue historique, XVI, 774.

[2] Pollock and Maitland, II, 273; Jenks, 62.

[3] Bracton, f. 62 b, uses the metaphor of the falling body to explain the rule about ascendants. On the doctrine of seisin "in nubibus," see Fearne, "Contingent Remainders," I, 359.

doctrines of our property law would seem to rest upon the analogizing process of the legal mind. While the English law seems to have largely employed mathematical and physical illustrations in this field of law, medieval German legal thought used an anatomical image to picture the law of descent. The rules of succession were explained by a reference to the human body and its branches, and the right of succession was denied beyond the seventh degree, the nails of the hands and feet.[1] Bluntschli's argument that the state is a male person, while the church is female, may be placed beside this medieval example.[2] The employment of such analogies and of classifications drawn from such analogies is a fundamental process, whose effects have been important in legal as in other institutions.[3]

The settlement of the rule of male primogeniture and the denial of the power of testation over lands determined much of the future history of English law. The first principle became so firmly fixed that to-day England stands alone among European states in sanctioning this system, with the exception of pre-revolutionary Russia and Serbia.[4] Much as the principle has been criticized

[1] Hübner, 716–719.

[2] Bluntschli, "Theory of the State," translated by Ritchie and others, 32.

[3] In a book that has come to the writer's notice since the above was written, occurs the following from the pen of Dean Wigmore: "My summary is then that no simple spiral will serve as an analogy; that no less complex an analogy than the planetary system will serve; that this analogy is a useful guide in our studies, because the gyroscopic interaction of planetary forces reveals to us the inevitableness of similar interactions in the forces affecting laws; and that therefore we cannot expect to trace the evolution of a single legal institution without conceiving of it as a body in motion produced by a force, this motion, modified by other immediate forces, and this body and its motions being one part only of a larger body which is itself in one or more motions produced by other forces and modifying the first motions; and this system as one part only of a larger system of forces and motions; and so on indefinitely": Wigmore, "Planetary Theory of the Law's Evolution," in Wigmore and Kocourek, "Formative Influences of Legal Development," 541, reprinted from Virginia Law Review, IV, 297 *et seq.* See, also, in the same volume, Picard, "The Perpetual Evolution of Law," 670 *et seq.*, translated from "Le droit pur."

[4] Maitland, "The Law of Real Property," "Collected Papers," I, 173.

by English writers, it has not been without defenders. McCulloch supported it on the ground that it tended to preserve for agriculture the benefits of the system of large industry; Dr. Johnson whimsically suggested that it served to make but one fool in a family instead of several.[1] The denial of the power of testation over land lasted long. True, the device of feoffments to uses, beginning with the twelfth century, enabled land owners to deal very freely with their lands, even extending to post mortem dispositions. But it was not until 1540 that recognition was given to the will of lands, directly, though certain local customs had always preserved the institution.[2] . . .

One of the most interesting features in the development of English testamentary law was the fate of the "légitime" or reserve. The law of the thirteenth century recognized this institution, and permitted the testator to bequeath only a part of his movables, one-third if he left a wife and children.[3] Until 1692 this system continued to prevail in the northern province of York, as it still does in Scotland. It was abolished by statute, so far as it prevailed in the province of York, in the last named year; it had long before ceased to exist in the province of Canterbury. It lasted in Wales until 1696, and in the City of London until 1724.[4] By the statutes just referred to, the principle of absolute liberty of testation became a universal principle in English law.

The codes of continental Europe, in their adoption of the rule of equal division in case of intestacy and in the

[1] McCulloch, "Succession," passim.

[2] 32 Hen. VIII, c. 1. As to the customs, see Pollock and Maitland, II, 330; Holdsworth, III, 66, 236; Bateson, "Borough Customs" (Selden Society), p. xcii; Gross, "The Medieval Law of Intestacy," Harvard Law Review, XVIII, 120.

[3] Pollock and Maitland, II, 348, 350; Holdsworth, III, 434.

[4] 4 and 5 Wm. and Mary, c. 2; 7 and 8 Wm. III, c. 38; 11 Geo. I, c. 18. These statutes, while they abolisned the légitime in England, did not change the local rules respecting the distribution of chattels in cases of intestate succession. It is a curious fact that absolute uniformity in the latter respect was not obtained until 1856: Holdsworth, III, 436.

matter of the reserve or légitime, present the greatest contrast to the English system. In all the principal ones restrictions more or less extensive in favor of the family of the testator exist upon his unlimited power of will making.[1] Thus, under the French Civil Code, the testator may bequeath only one-half of his property if he leave but one child, one-third if he leaves two, one-fourth if he leaves three, and so on — the denominator of the disposable fraction being one more than the number of children. . . .

Concerning the policy of the reserve a storm of controversy has arisen in France, such as in our more phlegmatic country or in England has never developed around principles of private law.[2] . . .

The English law of succession has undergone considerable modification in its new habitat in America. The distinction between the order of succession in real and personal property and the rule of primogeniture became the law of some of the colonies, but by the end of the revolutionary period, these peculiarities of the English system had been abolished in all the American colonies. The New England people had never recognized from the beginning the English rule of descent.[3] Massachusetts, at least as early as 1655, adopted the same rules of succession for real as for personal property, and did away with the principle of primogeniture, awarding to the

[1] Lehr, "Des successions testamentaires, d'après les principaux codes de l'Europe," Revue de droit international, XXXVIII, 144.

[2] An extensive literature upon this subject exists in France. The books of Le Play, "La réforme sociale," of Boissonnade, "Histoire de la réserve héréditaire," and of Brôcher, "Etude sur la légitime et les réserves," are among the most important. The Société d'économie sociale, stimulated by Le Play's writings, undertook an "Enquête sur l'état des familles et l'application des lois de successions." Brief accounts of the literature may be found in Planiol, III, 789; Bruns, Zeitschrift für Vergleichende Rechtswissenschaft, II, 190; Colin, "Le droit de succession dans le code civil," in "Le code civil: Livre du Centenaire," I, 297.

[3] Kent, "Commentaries," 14th ed., by Holmes, IV, 375, note d; "Two Centuries Growth of American Law," 186; Colin, "Le Code Civil," I, 304; Hildreth, "History of the United States," III, 387.

eldest son in its stead a double portion, "according to the law of nature and the dignity of birthright." The other leading principle of the English law of succession, liberty of testation, continues to exist, though with a tendency to limit it in some respects.

The tendency exhibited in the legislation, statutory and judicial, which has just been mentioned, evidences a strong predisposition to favor the widow and children, but without forbidding testators to devise their belongings as they chose. But with the development of the democratic movement in the United States during the first half of the nineteenth century, novel principles began to operate. The policy of exempting from forced sale a minimum of the debtor's property was early recognized by the states of the Union.[1] At first this was confined to the barest requirements, wearing apparel, household furniture, the tools of a mechanic. Later, a house and a small quantity of land, constituting the homestead of the debtor, were added to the exemptions.[2] More recent legislation has extended the amount and character of the exemptions.[3] It is but a step from the policy of exempting property from creditors' claims during the debtor's lifetime to that of giving such property upon decedent's death to his family free from such claims. Frequently, therefore, American statutes provide that the property of the decedent, exempt from execution, including the homestead, shall be set apart, free from the claims of creditors, to the widow and minor children. Usually such property is also removed from the scope of the testamentary power.[4] . . .

From another angle, great inroads have in recent times been made upon the entire matter of succession, especially

[1] See the early history of such statutes in *Bank v. Green*, 78 N. C. 247, 255.

[2] Warren, "History of the American Bar," 468; Dillon, "Laws and Jurisprudence of England and America," 360.

[3] See, *e.g.*, Code Civil Procedure, California, § 690.

[4] Woerner, "The American Law of Administration," I, 101.

testamentary succession, through the importation of inheritance taxes, death duties, and similar imposts and taxes. Though this manner of raising revenue was familiar to the Roman emperors and though the reliefs and primer seisins of the feudal system were essentially of this character, it fell into abeyance with the downfall of the feudal system. . . .

The methods by which the eighteenth century concept of the testator's rights and privileges has been modified are characteristic of our legal history. One man or a group of men criticizing anomalies or absurdities is like a voice in the wilderness. So conservative a suggestion as that urged by Joshua Williams that the property of decedents dying intestate and leaving no immediate relatives should go to the state rather than to distant relatives receives no attention. And though the state is annually spending large sums for education and benevolent work, it permits statutes to remain on the books, an inheritance from the past, which forbid the power to devise land or to bequeath personalty for charitable or educational uses.[1] The growing demands of the state, ever demanding new sources of revenue, gradually, however, diminish the number and importance of such anomalies, and without purporting to deal with testamentary institutions profoundly change their character. And thus by various devices liberty of testation is limited, although the law of inheritance and the law of wills remain in form unchanged.

[1] Sir Frederick Pollock, note, Law Quarterly Review, VII, 303; also, id., VII, 9. See also Bristowe, "The Legal Restrictions on Gifts to Charity," Law Quarterly Review, VII, 262.

PART IV

FAMILY

TITLE IV A: BIOLOGICAL AND SOCIAL BASIS OF THE FAMILY

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TITLE IV A: BIOLOGICAL AND SOCIAL BASIS OF THE FAMILY

CHAPTER XXXIX

THE FAMILY AS THE INSTRUMENT OF SOCIAL EVOLUTION[1]

It is now time to propose an answer to the question, already twice suggested and partly answered, How did social evolution originate? In the permanent family we have the germ of society. In the response to outer relations by psychical changes, which almost completely subordinate physical changes, we have the germ of civilization. Let us now take a step in advance of previous speculation, and see what can be done by combining these two theorems, so that the permanent organization of families and the complex intelligence of the highest mammal will appear in their causal relations to each other.

Many mammals are gregarious, and gregariousness implies incipient power of combination and of mutual protection. But gregariousness differs from sociality by the absence of definitive family relationships, except during

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The selection above reprinted is from his "Cosmic Philosophy" (Chicago: American Book Co., 1910), pages 86–98 (parts omitted).]

the brief and intermittent periods in which there are helpless offspring to be protected. . . .

It will be remembered that, in treating of the parallel evolution of the mind and the nervous system, it was shown that the increase of intelligence in complexity and speciality involves a lengthening of the period during which the nervous connections involved in ordinary adjustments are becoming organized. Even if the physical interpretation there given should turn out to be inadequate, the fact remains undeniable, that while the nervous connections accompanying a simple intelligence are already organized at birth, the nervous connections accompanying a complex intelligence are chiefly organized after birth. Thus there arise the phenomena of infancy, which are non-existent among those animals whose psychical actions are purely reflex and instinctive. Infancy, psychologically considered, is the period during which the nerve connections and correlative ideal associations necessary for self-maintenance are becoming permanently established. Now this period, which only begins to exist when the intelligence is considerably complex, becomes longer and longer as the intelligence increases in complexity. In the human race it is much longer than in any other race of mammals, and it is much longer in the civilized man than in the savage. Indeed among the educated classes of civilized society, its average duration may be said to be rather more than a quarter of a century, since during all this time those who are to live by brain work are simply acquiring the capacity to do so, and are usually supported upon the products of parental labor.

It need not be said that, on the general theory of evolution, the passage from the short infancy of other primates to the relatively long infancy witnessed among the lowest contemporary savages cannot have been a sudden one.[1]

[1] In this connection it is interesting to observe that the phenomena of infancy seem to be decidedly more marked in the anthropoid apes than in other non-

But a special reason may be assigned why Nature, which never makes long jumps, must have been incapable of making this particular jump. Throughout the animal kingdom the period of infancy is correlated with feelings of parental affection, sometimes confined to the mother, but often shared by the father, as in the case of animals which mate. Where, as among the lower animals, there is no infancy, there is no parental affection. Where the infancy is very short, the parental feeling, though intense while it lasts, presently disappears, and the offspring cease to be distinguished from strangers of the same species. And in general the duration of the feelings which insure the protection of the offspring is determined by the duration of the infancy. The agency of natural selection in maintaining this balance is too obvious to need illustration. Hence, if long infancies could have suddenly come into existence among a primitive race of ape-like men, the race would have quickly perished from inadequate persistence of the parental affections. The prolongation must, therefore, have been gradual, and the same increase of intelligence to which it was due must also have prolonged the correlative parental feelings, by associating them more and more with anticipations and memories. The concluding phases of this long change may be witnessed in the course of civilization. Our parental affections now endure through life — and while their fundamental instinct is perhaps no stronger than in savages, they are, nevertheless, far more effectively powerful, owing to our far greater power of remembering the past and anticipating the future.

I believe we have now reached a very thorough and

human primate. At the age of one month the orang-outang begins to learn to walk, holding on to convenient objects of support, like a human infant. Up to this time it lies on its back, tossing about and examining its hands and feet. A monkey at the same age has reached maturity, so far as locomotion and prehension are concerned. See Mr. Wallace's interesting experience with an infant orang-outang in his "Malay Archipelago," vol. I, pp. 68–71.

satisfactory explanation of the change from Gregariousness to Sociality. . . .

Thus we cross the chasm which divides animality from humanity, gregariousness from sociality, hedonism from morality, the sense of pleasure and pain from the sense of right and wrong. For note that by the time integration has resulted in the establishment of a permanent family group with definite relationships between the members, the incentives to action in each member of the group have become quite different from what they were in a state of mere gregariousness. Sympathy, or the power of ideally reproducing in one's self the pleasures and pains of another person, is manifested in a rudimentary form by all gregarious animals of moderate intelligence. . . .

Given this rudimentary capacity of sympathy, we can see how family integration must alter and complicate the emotional incentives to action. While the individual may still exercise his brute-like predatory instincts upon strangers and lower animals, and will, indeed, be more highly approved the more he does so, on the other hand there is a curb upon his exercise of them within the limits of the clan. There is a nascent public opinion which lauds actions beneficial to the clan, and frowns upon actions detrimental to it. In these ways the establishment of permanent family relationships generates new incentives to action, unknown in the previous epoch of mere gregariousness, which must often, and in some instances habitually, overrule the mere animal incentives comprised in personal pleasures and pains. The good of the individual must begin to yield to the good of the community.

Next in order comes the genesis of the feelings of regret and remorse, which are the fundamental ingredients of conscience. . . .

Upon the consequences of this state of things, in gradually bringing about that capacity for progress which distinguishes man from all lower animals, I need not

further enlarge. What we have here especially to note, amid the entanglement of all these causes conspiring to educe humanity from animality, is the fact, illustrated above, that this prolongation of infancy was manifestly the circumstance which knit those permanent relationships, giving rise to reciprocal necessities of behavior, which distinguish the rudest imaginable family group of men from the highest imaginable association of gregarious non-human primates. . . .

We bridge the gulf which seems, on a superficial view, forever to divide the human from the brute world. And not least, in the grand result, is the profound meaning which is given to the phenomena of helpless babyhood. From of old we have heard the monition, "Except ye be as babes, ye cannot enter the kingdom of heaven." The latest science now shows us — though in a very different sense of the words — that, unless we had been as babes, the ethical phenomena which give all its significance to the phrase "kingdom of heaven" would have been non-existent for us. Without the circumstances of infancy we might have become formidable among animals through sheer force of sharp-wittedness. But, except for these circumstances, we should never have comprehended the meaning of such phrases as "self-sacrifice" or "devotion." The phenomena of social life would have been omitted from the history of the world, and with them the phenomena of ethics and of religion.

CHAPTER XL

SOCIAL FUNCTION OF THE FAMILY: MONOGAMY AND POLYGAMY[1]

The Primary Function of the Family is continuing the life of the species; that is, the primary function of the family is reproduction in the sense of the birth and rearing of children. While other functions of the family have been delegated in a large measure to other social institutions, it is manifest that this function cannot be so delegated. We know of no human society in which the birth and rearing of children has not been the essential function of the family. In present society, at least, the stream of life must flow through the family. The constitution of the family, therefore, determines the heredity of the child as well as its care and upbringing. If the family performed no other function than this of producing the new individuals of society and furnishing them physical care and nurture until maturity is reached, it would still be the most important of all human institutions. From a sociological point of view the childless family must be judged a failure. . . .

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The selection above reprinted is from his "Sociology and Modern Social Problems," New Edition, Copyright, (New York: American Book Co., 1919), pages 81–128 (parts omitted). It is reprinted by special arrangement with American Book Company, publishers.]

The Function of the Family in Conserving Social Possessions. — The family is still the chief institution in society for transmitting from one generation to another social possessions of all sorts, and, therefore, of conserving the social order. Property in the form of land or houses or personal property, society permits the family to pass along from generation to generation. The family is the chief institutional vehicle of social tradition, because the child gets its language mainly in the family; and in social tradition is embodied all the beliefs, standards, and values of civilization regarding industry, government, law, religion, morality, the family, and general social life.

The Family as a School.—So much does the child get his essential social traditions from the family, that many educators hold that the most essential things in social education can never be given in the public schools, but must be given in the home. This is especially true of religious and moral instruction. The real foundations of moral character are laid while the child is yet of tender age in the family circle. In the family the child first learns the meaning of authority, obedience, loyalty, love, service, and all the human virtues. If the child fails to get proper moral standards and ideals from his family life, he gets them with greater difficulty, if at all, from society later. The same is true regarding political ideas and standards. If the child fails to learn in his family life loyalty to his country, respect for law, and the ideals of good citizenship, there are good prospects of his being numbered among the lawless or unpatriotic elements of society later. Even habits of work must be learned by the child largely in the family. Thus the rudiments of morality, of religion, of government, of law, and even of industry are transmitted in the family and learned by the child in his family group. . . .

Thus the family is the great conserving agency in society to preserve social order and to transmit from generation

to generation both the material and the spiritual possessions of the race.

The Function of the Family in Social Progress. — While the conservative functions of the family in social life are very obvious, the part which it plays in social progress has often been overlooked and even denied. Now, social progress, we shall see later, depends mainly upon two things: the accumulation of knowledge and the accumulation of altruism — regard for others — in society. It is, of course, through the latter that the family life plays a part in social progress. The family is the chief generator of altruism in society, and increasing altruism is necessary for the success of those more and more complex forms of coöperation which characterize higher civilization and upon which it depends. It is chiefly in the family that children learn to love, to be of service, to sacrifice for others, and to respect one another's rights. If the family fails to teach the spirit of service and self-sacrifice to its members, it is hardly probable that they will get much of that spirit from society at large. The amount of altruism in society, therefore, has a very close relation to the quality of its family life. . . .

Thus we have a brief presentation of the claim of the family to be regarded not only as the primary, but also as the most important institution of human society. While primarily its function is the birth and proper rearing of children, yet in performing this function it has become the chief medium for carrying and nourishing the essential values of civilization. It has been the cradle of civilization in the past, and something like its organization at best seems to be the normal goal which men set up for society at large to realize. The nation whose family life decays, therefore, rots at the core; for its chief spring of social and civic virtue dries up. . . .

THE FORMS OF THE FAMILY

The family as an institution has varied greatly in its forms from age to age and from people to people. . . .

Polyandry. — We must notice now the various forms of marriage by which the family has been constituted among different peoples and in different ages. . . .

Polyandry, or the union of one woman with several men, is a relatively rare form of marriage and the family. . . .

Polygyny,[1] or the union of one man with several women, is a much more common form of marriage. . . .

Some judgment of the social value of polygyny may not be out of place in connection with this subject. Admitting, as all students of social history must, that in certain times and places the polygynous form of family has been advantageous, has served the interests of social survival and even of civilization, yet viewed from the standpoint of present society it seems that our judgment of polygyny must be wholly unfavorable. In the first place, as we have already seen, polygyny is essentially an institution of barbarism. It arose largely through the practice of wife capture and the keeping of female slaves. While often adjusted to the requirements of barbarous societies, it seems in no way adjusted to a high civilization. Polygyny, indeed, must necessarily rest upon the subjection and degradation of women. Necessarily the practice of polygyny must disregard the feelings of women, for women are jealous creatures as well as men. No high regard for the feelings of women, therefore, would be consistent with the practice of polygyny. Finally, all the evidence that we have goes to show that under polygyny children are

[1] The word "polygamy" is too broad in its meaning to use as a scientific term for this form of the family. "Polygamy" comes from two Greek words meaning "much married"; hence it includes "polyandry" (having several husbands) and "polygyny" (having several wives).

neglected, and, at least from the standpoint of a high civilization, inadequately socialized. This must necessarily be so, because in the polygynous family the care of the children rests almost entirely with the mother. While we have no statistics of infant mortality from polygynous countries, it seems probable that infant mortality is high, and social workers in communities with polygynous families quite generally testify that delinquent children are especially found in such households. Fatherhood, in the full sense of the word, can hardly be said to exist under polygyny. . . .

Those philosophers, like Schopenhauer, who advocate the legalizing of polygyny in civilized countries, are hardly worth replying to. It is safe to say that any widespread practice of polygyny in civilized communities would lead to a reversion to the moral standards of barbarism in many if not in all matters. That polygyny is still a burning question in the United States of the twentieth century is merely good evidence that we are not very far removed yet from barbarism.

Monogamy, as we have already seen, has been the prevalent form of marriage in all ages and in all countries. Wherever other forms have existed monogamy has existed alongside of them as the dominant, even though perhaps not the socially honored, form. All other forms of the family must be regarded as sporadic variations, on the whole unsuited to long survival, because essentially inconsistent with the nature of human society. In civilized Europe monogamy has been the only form of the family sanctioned for ages by law, custom, and religion. The leading peoples of the world, therefore, practice monogamy, and it is safe to say that the connection between monogamy and progressive forms of civilization is not an accident.

What, then, are the social advantages of monogamy which favor the development of a higher type of culture?

These advantages are numerous, but perhaps the most important of them can be grouped under six heads.

(1) The number of the two sexes, as we have already seen, is everywhere approximately equal. This means that monogamy is in harmony with the biological conditions that exist in the human species. The equal number of the two sexes has probably been established through natural selection. Why nature should favor this proportion of the sexes can perhaps be in part understood when we reflect that with such proportion there can be the largest number of family groups, and hence the best possible conditions for the rearing of offspring.

(2) Monogamy secures the superior care of children in at least two respects. First, it very greatly decreases mortality in children, because under monogamy both husband and wife unite in their care. Again, monogamy secures the superior upbringing and, therefore, the superior socialization of the child. In the monogamous family much greater attention can be given to the training of children by both parents. In other forms of the family not only is the death rate higher among children, but from the point of view of modern civilization, at least, they are inferiorly socialized.

(3) The monogamic family alone produces affections and emotions of the higher type. It is only in the monogamic family that the highest type of altruistic affection can be cultivated. It is difficult to understand, for example, how anything like unselfish affection between husband and wife can exist under polygyny. Under monogamy, husband and wife are called upon to sacrifice selfish desires in the mutual care of children. Monogamy is, therefore, fitted as a form of the family to foster altruism in the highest degree, and, as we have seen, the higher the type of altruism produced by the family life, the higher the type of the social life generally, other things being equal. It is especially to the credit of monogamy that it

has created fatherhood in the fullest sense of the term, and therefore taught the male element in human society the value of service and self-sacrifice. Under polygynous conditions the father cannot devote himself to any extent to his children or to any one wife, since he is really the head of several households, and therefore, as we have already noted, fatherhood in the fullest sense scarcely exists under polygyny.

(4) Under monogamy, moreover, all family relationships are more definite and strong, and thus family bonds, and ultimately social bonds, are stronger. In the polygynous household the children of the different wives are half brothers and half sisters, hence family affection has little chance to develop among them, and as a matter of fact between children of different wives there is constant pulling and hauling. Moreover, because the children in a polygynous family are only half brothers this immensely complicates relationships, and even the line of ancestors. Legal relations and all blood relationships are, therefore, more entangled. It is no inconsiderable social merit of monogamy that it makes blood relationships simple and usually perfectly definite. All of this has an effect upon society at large, because the cohesive power of blood relationship, even in modern societies, is something still worth taking into account. But, of course, the main influence of all this is to be found in the family group itself, because it is only under such simple and definite relations as we find in the monogamous family that there is ample stimulus to develop the higher family affections.

(5) From all this it follows that monogamy favors the development of high types of religion and morals, family affection being an indispensable root of any high type of ethical religion. That form of the family which favors the development of the highest type of this affection will, therefore, favor the development of the highest type of religion. We see this even more plainly, perhaps, in

ancient times than in the present time, because it was monogamy that favored the development of ancestor worship through making the line of ancestors clear and definite, and thus monogamy helped to develop this type of religion, which became the basis of still higher types.

(6) Monogamy not only favors the preservation of the lives of the children, but also favors the preservation of the lives of the parents, because it is only under monogamy that we find aged parents cared for by their children to any extent. Under polygyny the wife who has grown old is discarded for a young wife, and usually ends her days in bitterness. The father, too, under polygyny is rarely cared for by the children, because the polygynous household has never given the opportunity for close affections between parents and children. That monogamy, therefore, helps to lengthen life through favoring care of parents by children in old age is an element in its favor, for it adds not a little to the happiness of life, and so to the strength of social bonds, that people do not have to look forward to a cheerless and friendless old age.

In brief, the monogamic family presents such superior unity and harmony from every point of view that it is much more fitted to produce a higher type of culture. From whatever point of view we may look at it, therefore, there are many reasons why civilized societies cannot afford to sanction any other form of the family than that of monogamy.

CHAPTER XLI

BIOLOGIC AND ECONOMIC ASPECTS OF THE MODERN FAMILY[1]

The family in its moral aspects has one end, the common good of all its members, but this has three aspects. (1) Marriage converts an attachment between man and woman, either of passion or of friendship, into a deliberate, intimate, permanent, responsible union for a common end of mutual good. It is this common end, a good of a higher, broader, fuller sort than either could attain in isolation, which lifts passion from the impulsive or selfish to the moral plane; it is the peculiar intimacy and the peculiar demands for common sympathy and coöperation,

[1][By John Dewey and James H(ayden) Tufts.

John Dewey was born at Burlington, Vt., Oct. 20, 1859; A.B. (1879) University of Vermont; Ph.D. (1884) Johns Hopkins University; since 1904, professor of philosophy, Columbia University. Professor Dewey's works include: "Psychology" (1896); "Leibnitz" (1888); "Critical Theory of Ethics" (1894); "Study of Ethics" (1894); "Psychology of Number" (1894); "School and Society" (1899); "Studies in Logical Theory" (1903); "How to Think" (1909); "Influence of Darwin on Philosophy" (1910); "German Philosophy and Politics" (1915); "Democracy and Education" (1916).

James H. Tufts was born at Monson, Mass., July 9, 1862; A.B. (1884), A.M. (1890), Amherst; B.D. (1889) Yale University; Ph.D. (1892) Freiburg; professor of philosophy at University of Chicago, 1900– ; Editor of International Journal of Ethics, 1914– . His works include: "Ethics" (1908, with Professor Dewey); "Our Democracy" (1917); "The Real Business of Living" (1918); "Ethics of Coöperation" (1918); Windelband's "History of Philosophy" (1893, translation).

The selection above reprinted is from the authors' "Ethics" (New York: Henry Holt & Co., 1908), being chapter XXVI of that work (parts omitted).]

which give it greater depth and reach than ordinary friendship. (2) The family is the great social agency for the care and training of the race. (3) This function reacts upon the character of the parents. Tenderness, sympathy, self-sacrifice, steadiness of purpose, responsibility, and activity, are all demanded and usually evoked by the children. . . .

Morally, the realization of these values, and the further effects upon character noted above, depend greatly upon the terms under which the marriage union is formed and maintained. The number of parties to the union, the mode of forming it, its stability, and the relations of husband and wife, parents and children, while in the family relation, have shown in western civilization a tendency toward certain lines of progress, although the movement has been irregular and has been interrupted by certain halts or even reversions. . . .

The psychology of family life may be conveniently considered under two heads: that of the husband and wife, and that of parents and children, brothers and sisters.

1. The complex sentiment, love, which is found in the most perfect family life, is on the one hand (1) a feeling or emotion; on the other (2) a purpose, a will. Both these are modified and strengthened by (3) parenthood and (4) social and religious influences.

(1) *The Emotional and Instinctive Basis.* — As feeling or emotion love may have two roots. A mental sympathy, based on kindred tastes and interests, is sometimes present at the outset, but in any case it is likely to develop under the favoring conditions of a common life, particularly if there are either children or a common work. But it is well known that this is not all. A friend is one thing; a lover another. The intimacy involved requires not only the more easily described and superficial attraction of mind for mind; it demands also a deeper congeniality

of the whole person, incapable of precise formulation, manifesting itself in the subtler emotional attitudes of instinctive reaction. This instinctive, as contrasted with the more reflective, attraction is frequently described as one of opposites or contrasting dispositions and physical characteristics. But this is nothing that enters into the feeling as a conscious factor. The only explanation which we can give in the present condition of science is the biological one. From the biological point of view it was a most successful venture when Nature, by some happy variation, developed two sexes with slightly different characters and made their union necessary to the continuance of life in certain species. By uniting in every new individual the qualities of two parents, the chances of variation are greatly increased, and variation is the method of progress. To keep the same variety of fruit the horticulturist buds or grafts; to get new varieties he plants seed. The extraordinary progress combined with continuity of type, which has been exhibited in the plant and animal world, has been effected, in part at least, through the agency of sex. This long process has developed certain principles of selection which are instinctive. Whether they are the best possible or not, they represent a certain adjustment which has secured such progress as has been attained, and such adaptation to environment as exists, and it would be unwise, if it were not impossible, to disregard them. Marriages of convenience are certainly questionable from the biological standpoint.

But the instinctive basis is not in and of itself sufficient to guarantee a happy family life. If man were living wholly a life of instinct, he might trust instinct as a guide in establishing his family. But since he is living an intellectual and social life as well, intellectual and social factors must enter. The instinctive basis of selection was fixed by conditions which contemplated only a more or less limited period of attachment, with care of the young

for a few years. Modern society requires the husband and wife to contemplate life-long companionship, and a care for children which implies capacity in the father to provide for a great range of advantages, and in the mother to be intellectual and moral guide and friend until maturity. To trust the security of these increased demands to instinct is to invite failure. Instinct must be guided by reason if perfect friendship and mutual supplementation in the whole range of interests are to be added to the intenser, but less certain, attraction.

(2) *The Common Will.* — But whether based on instinct or intellectual sympathy, no feeling or emotion by itself is an adequate moral basis for the life together of a man and a woman. What has already been said as to the moral worthlessness of any *mere* feeling abstracted from will, applies here. Love or affection, in the only sense in which it makes a moral basis of the family, is not the "affection" of psychological language — the pleasant or unpleasant tone of consciousness; it is the resolute purpose in each to seek the other's good, or rather to seek a *common* good which can be attained only through a common life involving mutual self-sacrifice. It is the good will of Kant specifically directed toward creating a common good. It is the formation of a small "kingdom of ends" in which each treats the other "as end," never as means only; in which each is "both sovereign and subject"; in which the common will, thus created, enhances the person of each and gives it higher moral dignity and worth. And, as in the case of all purpose which has moral value, there is such a common good as the actual result. The disposition and character of both husband and wife are developed and s pplemented. The male is biologically the more variable and motor. He has usually greater initiative and strength. Economic and industrial life accentuates these tendencies. But alone he is apt to become rough or hard, to lack the feeling in which the charm and value of life

are experienced. On the other hand, the woman, partly by instinct, it may be, but certainly by vocation, is largely occupied with the variety of cares on which human health, comfort, and morality depend. She tends to become narrow, unless supplemented by man. The value of emotion and feeling in relation to this process of mutual aid and enlargement, as in general, is, as Aristotle pointed out, to perfect the will. It gives warmth and vitality to what would otherwise be in any case partial and might easily become insincere. There was a profound truth which underlay the old psychology in which "the heart" meant at once character and passion.

(3) *The Influence of Parenthood.* — Nature takes one step at a time. If all the possible consequences of family life had to be definitely forecasted, valued, and chosen at the outset, many would shrink. But this would be because there is as yet no capacity to appreciate new values before the actual experience of them. "Every promise of the soul has innumerable fulfillments; each of its joys ripens into a new want." Parental affection is not usually present until there are real children to evoke it. At the outset the mutual love of husband and wife is enough. But as the first, more instinctive and emotional factors lose relatively, the deeper union of will and sympathy needs community of interest if it is to become permanent and complete. Such community of interest is often found in sharing a business or a profession, but under present industrial organization this is not possible as a general rule. The most general and effective object of common interest is the children of the family. As pointed out by John Fiske, the mere keeping of the parents together by the prolongation of infancy in the human species has had great moral influence. Present civilization does not merely demand that the parents coöperate eight or ten years for the child's physical support. There has been a second epoch in the prolongation. The parents now must co-

operate until the children are through school and college, and in business or homes of their own. And the superiority of children over the other common interests is that in a different form the parents repeat the process which first took them out of their individual lives to unite for mutual helpfulness. If the parents treat the children not merely as sources of gratification or pride, but as persons, with lives of their own to live, with capacities to develop, the personality of the parent is enlarged. The affection between husband and wife is enriched by the new relationship it has created.

(4) *Social and Religious Factors.* — The relations of husband and wife, parent and child, are the most intimate of personal relations, but they are none the less relations of social interest. In fact, just because they are so intimate, society is the more deeply concerned. Or, to put it from the individual's standpoint, just because the parties are undertaking a profoundly personal step, they must take it as members of a moral order. The act of establishing the family signifies, indeed, the entrance into fuller participation in the social life; it is the assuming of ties which make the parties in a new and deeper sense organic parts of humanity. This social and cosmic meaning is appropriately symbolized by the civil and religious ceremony. In its control over the marriage contract, and in its prescriptions as to the care and education of the children, society continues to show its interest. All this lends added value and strength to the emotional and intellectual bases.

2. *Parent and Child.* — The other relationships in the family, those of parents and children, brothers and sisters, need no elaborate analysis. The love of parents for children, like that of man and woman, has an instinctive basis. Those species which have cared for their offspring have had a great advantage in the struggle for existence. Nature has selected them, and is constantly

dropping the strains of any race or set which cares more for power, or wealth, or learning than for children. Tenderness, courage, responsibility, activity, patience, forethought, personal virtue — these are constantly evoked not by the needs of children in general, but by the needs of our own children. In fact, from the point of view of the social organism as a whole, the family has two functions; as a smaller group, it affords an opportunity for eliciting the qualities of affection and character which cannot be displayed at all in the larger group; and, in the second place, it is a training for future members of the larger group in those qualities of disposition and character which are essential to citizenship.

The family as an economic unit includes the relation of its members to society both as producers and as consumers.

The Family and Production. — We have noted the industrial changes which have seemed to draw the issue sharply between the home and outside occupations. We have seen that the present organization of industry, business, and the professions has separated most of the occupations from the family, so that woman must choose between family and a specific occupation, but cannot ordinarily combine the two. We have said that in requiring all its women to do the same thing the family seems to exclude them from individual pursuits adapted to their talents, and to exclude them likewise from the whole scientific and technical proficiency of modern life. Is this an inevitable dilemma? Those who think it is divide into two parties, which accept respectively the opposite horns. The one party infers that the social division of labor must be: man to carry on all occupations outside the family, woman to work always within the family. The other party infers that the family life must give way to the industrial tendency.

(1) The "domestic theory," or, as Mrs. Bosanquet styles it, the "pseudo-domestic" theory, is held sincerely by many earnest friends of the family in both sexes. They feel strongly the fundamental necessity of family life. They believe further that they are not seeking to subordinate woman to the necessities of the race, but rather to give her a unique position of dignity and affection. In outside occupations she must usually be at a disadvantage in competition with men, because of her physical constitution which Nature has specialized for a different function. In the family she "reigns supreme." With most women life is not satisfied, experience is not full, complete consciousness of sex and individuality is not attained, until they have dared to enter upon the full family relations. Let these be preserved not merely for the race, but especially for woman's own sake. Further, it is urged, when woman enters competitive occupations outside the home, she lowers the scale of wages. This makes it harder for men to support families, and therefore more reluctant to establish them. . . .

(2) The other horn of the dilemma is accepted by many writers, especially among socialists. These writers assume that the family necessarily involves not only an exclusively domestic life for all women, but also their economic dependence. They believe this dependence to be not merely a survival of barbarism, but an actual immorality in its exchange of sex attraction for economic support. Hence they would abandon the family or greatly modify it. It must no longer be "coercive"; it will be coercive under present conditions.

Fallacies in the Dilemma. — Each of these positions involves a fallacy which releases us from the necessity of choosing between them. The root of the fallacy in each case is the conception that the economic status determines the moral end, whereas the moral end ought to determine the economic status.

The fallacy of the pseudo-domestic theory lies in supposing that the home must continue its old economic form or be destroyed. What is essential to the family is that man and wife, parents and children, should live in such close and intimate relation that they may be mutually helpful. But it is not essential that present methods of house construction, domestic service, and the whole industrial side of home life be maintained immutable. A growing freedom in economic pursuit would improve the home, not injure it. For nothing that interferes with normal development is likely to prove beneficial to the family's highest interest.

The fallacy of those who would abolish the family to emancipate woman from economic dependence is in supposing that because the woman is not engaged in a gainful occupation she is therefore being supported by the man for his own pleasure. This is to adopt the absurd assumptions of the very condition they denounce. This theory, at most, applies to a marriage which is conceived from an entirely selfish and commercial point of view. If a man marries for his own pleasure and is willing to pay a cash price; if a woman marries for cash or support and is willing to pay the price, there is no doubt as to the proper term for such a transaction. The result is not a family in the moral sense, and no ceremonies or legal forms can make it moral. A family in the moral sense exists for a common good, not for selfish use of others. To secure this common good each member contributes a part. If both husband and wife carry on gainful occupations, well; if one is occupied outside the home and the other within, well also. If there are children, the woman is likely to have the far more difficult and wearing half of the common labor. Which plan is followed, *i.e.*, whether the woman works outside or within the home, ought to depend on which plan is better on the whole for all concerned, and this will depend largely on the woman's own

ability and tastes, and upon the number and age of the children. But the economic relation is not the essential thing. The essential thing is that the economic be held entirely subordinate to the moral conception, before marriage and after.

TITLE IV B: MODERN PROBLEMS

CHAPTER XLII

THEORY OF MARRIAGE FREEDOM AND PARENTAL OBLIGATION [1]

We may conclude that — as the approximately equal number of the sexes indicates — in the human species, as among many of the higher animals, a more or less permanent monogamy has on the whole tended to prevail. That is a fact of great significance in its implications. For we have to realize that we are here in the presence of a natural fact. . . .

If monogamy is thus firmly based it is unreasonable to fear, or to hope for, any radical modification in the institution of marriage, regarded, not under its temporary religious and legal aspects but as an order which appeared on the earth even earlier than man. Monogamy is the most natural expression of an impulse which cannot, as a rule, be so adequately realized in full fruition under conditions involving a less prolonged period of mutual communion and intimacy. Variations, regarded as inevitable oscillations around the norm, are also natural, but union in couples must always be the rule because

[1] [By Henry Havelock Ellis: born at Croydon, Surrey, England, Feb. 2, 1859.

His works include: "The New Spirit" (1890); "The Criminal" (1890); "A Study of Human Secondary Sexual Character" (1894); "Sexual Inversion" (1897); "Affirmations" (1897); "The Evolution of Modesty" (1899); "A Study of British Genius" (1904); "Analysis of the Sexual Impulse" (1903); "Erotic Symbolism" (1906); "Sex in Relation to Society" (1910).

The selection above reprinted is from his "Sex in Relation to Society" (Philadelphia: F. A. Davis & Co., 1911), pages 427–506 (parts omitted).]

the numbers of the sexes are always approximately equal, while the needs of the emotional life, even apart from the needs of offspring, demand that such unions based on mutual attraction should be so far as possible permanent.

It may seem to some that so conservative an estimate of the tendencies of civilization in matters of sexual love is due to a timid adherence to mere tradition. That is not the case. We have to recognize that marriage is firmly held in position by the pressure of two opposing forces. There are two currents in the stream of our civilization: one that moves towards an ever greater social order and cohesion, the other that moves towards an ever greater individual freedom. There is real harmony, underlying the apparent opposition of these two tendencies, and each is indeed the indispensable complement of the other. There can be no real freedom for the individual in the things that concern that individual alone unless there is a coherent order in the things that concern him as a social unit. Marriage in one of its aspects only concerns the two individuals involved; in another of its aspects it chiefly concerns society. The two forces cannot combine to act destructively on marriage, for the one counteracts the other. They combine to support monogamy, in all essentials, on its immemorial basis. . . .

The only way in which we can fruitfully approach the question of the value of the transformations now taking place in our marriage-system is by considering the history of that system in the past. In that way we learn the real significance of the marriage-system, and we understand what transformations are, or are not, associated with a fine civilization. When we are acquainted with the changes of the past we are enabled to face more confidently the changes of the present.

There cannot be the slightest doubt that the difficulty, the confusion, the inconsistency, and the flagrant indecency which surround divorce and the methods of

securing it are due solely and entirely to the subtle persistence of traditions based, on the one hand, on the Canon law doctrines of the indissolubility of marriage and the sin of sexual intercourse outside marriage, and, on the other hand, on the primitive idea of marriage as a contract which economically subordinates the wife to the husband and renders her person, or at all events her guardianship, his property. It is only when we realize how deeply these traditions have become embedded in the religious, legal, social and sentimental life of Europe that we can understand how it is that barbaric notions of marriage and divorce can to-day subsist in a stage of civilization which has, in may respects, advanced beyond such notions.

The Canon law conception of the abstract religious sanctity of matrimony, when transferred to the moral sphere, makes a breach of the marriage relationship seem a public wrong; the conception of the contractive subordination of the wife makes such a breach on her part, and even, by transference of ideas, on his part, seem a private wrong. These two ideas of wrong incoherently flourish side by side in the vulgar mind, even to-day.

The economic subordination of the wife as a species of property significantly comes into view when we find that a husband can claim, and often secure, large sums of money from the man who sexually approaches his property, by such trespass damaging it in its master's eyes.[1] . . .

At the same time, however, the influence of Canon law comes inconsistently to the surface and asserts that a breach of matrimony is a public wrong, a sin transformed by the State into something almost or quite like a crime. . . .

[1] Adultery in most savage and barbarous societies is regarded, in the words of Westermarck, as "an illegitimate appropriation of the exclusive claims which the husband has acquired by the purchase of his wife, as an offense against property"; the seducer is, therefore, punished as a thief, by fine, mutilation, even death ("Origin of the Moral Ideas," II, pp. 447 *et seq.*; *id.*, "History of Human Marriage," p. 121). Among some peoples it is the seducer who alone suffers, and not the wife.

It is quite evident that from the social or the moral point of view, it is best that when a husband and wife can no longer live together, they should part amicably, and in harmonious agreement effect all the arrangements rendered necessary by their separation. The law ridiculously forbids them to do so, and declares that they must not part at all unless they are willing to part as enemies. In order to reach a still lower depth of absurdity and immorality the law goes on to say that if as a matter of fact they have succeeded in becoming enemies to each other to such an extent that each has wrongs to plead against the other party, they cannot be divorced at all![1] That is to say that when a married couple have reached a degree of separation which makes it imperatively necessary, not merely in their own interests but in the moral interests of society, that they should be separated and their relations to other parties concerned regularized, then they must on no account be separated.

It is clear how these provisions of the law are totally opposed to the demands of reason and morality. . . .

The divorce movement is not, as some have foolishly supposed, a movement making for immorality.[2] Immorality is the inevitable accompaniment of indissoluble marriage; the emphasis on the sanctity of a merely formal union discourages the growth of moral responsibility as regards the hypothetically unholy unions which grow up

[1] This rule is, in England, by no means a dead letter. Thus, in 1907, a wife who had left her home, leaving a letter stating that her husband was not the father of her child, subsequently brought an action for divorce, which, as the husband made no defense, she obtained. But, the King's Proctor having learned the facts the decree was rescinded. Then the husband brought an action for divorce, but could not obtain it, having already admitted his own adultery by leaving the previous case undefended. He took the matter up to the Court of Appeal, but his petition was dismissed, the Court being of opinion that "to grant relief in such a case was not in the interest of public morality." The safest way in England to render what is legally termed marriage absolutely indissoluble is for both parties to commit adultery.

[2] Lecky, the historian of European morals, has pointed out ("Democracy and Liberty," vol. II, p. 172) the close connection generally between facility of divorce and a high standard of sexual morality.

beneath its shadow. To insist, on the other hand, by establishing facility of divorce, that sexual unions shall be real, is to work in the cause of morality. The lands in which divorce by mutual consent has prevailed longest are probably among the most, and not the least, moral of lands. . . .

There seems to be little doubt that the modern movement for divorce must inevitably tend to reach the goal of separation by the will of both parties, or, under proper conditions and restrictions, by the will of one party. It now requires the will of two persons to form a marriage; law insists on that condition.[1] It is logical as well as just that law should take the next step involved by the historical evolution of marriage, and equally insist that it requires the will of two persons to maintain a marriage. . . .

It is said by some that if there were no impediments to divorce, a man might be married in succession to half a dozen women. These simple-minded or ignorant persons do not seem to be aware that even when marriage is absolutely indissoluble a man can, and frequently does, carry on sexual relationships not merely successively, but, if he chooses, even simultaneously, with half a dozen women. There is, however, this important difference that, in the one case, the man is encouraged by the law to believe that he need only treat at most one of the six women with anything approaching to justice and humanity; in the other case the law insists that he shall fairly and openly fulfill his obligations towards all the six women. It is a very important difference, and there ought to be no question as to which state of things is moral and which immoral. It is no concern of the State to inquire into the

[1] In England this step was taken in the reign of Henry VII, when the forcible marriage of women against their will was forbidden by statute (3 Henry VII, c. 2). Even in the middle of the seventeenth century, however, the question of forcible marriage had again to be dealt with (Inderwick, "Interregnum," pp. 40 *et seq.*).

number of persons with whom a man or a woman chooses to have sexual relationships; it is a private matter which may indeed affect their own finer spiritual development but which it is impertinent for the State to pry into. It is, however, the concern of the State, in its own collective interest and that of its members, to see that no injustice is done.

But what about the children? That is necessarily a very important question. The question of the arrangements made for the children in cases of divorce is always one to which the State must give its regulative attention, for it is only when there are children that the State has any real concern in the matter.

At one time it was even supposed by some that the existence of children was a serious argument against facility of divorce. A more reasonable view is now generally taken. It is, in the first place, recognized that a very large proportion of couples seeking divorce have no children. In England the proportion is about forty per cent; in some other countries it is doubtless larger still. But even when there are children no one who realizes what the conditions are in families where the parents ought to be but are not divorced can have any doubt that usually those conditions are extremely bad for the children. The tension between the parents absorbs energy which should be devoted to the children. The spectacle of the grievances or quarrels of their parents is demoralizing for the children, and usually fatal to any respect towards them. At the best it is injuriously distressing to the children. One effective parent, there cannot be the slightest doubt, is far better for a child than two ineffective parents. . . .

There is a final argument which is often brought forward against facility of divorce. Marriage, it is said, is for the protection of women; facilitate divorce and women are robbed of that protection. It is obvious that this argument

has little application as against divorce by mutual consent. A woman at marriage is deprived by society and the law of her own name. She has been deprived until recently of the right to her own earnings. She is deprived of the most intimate rights in her own person. She is deprived under some circumstances of her own child, against whom she may have committed no offense whatever. It is perhaps scarcely surprising that she is not greatly appreciative of the protection afforded her by the withholding of the right to divorce her husband. "Ah, no, no protection!" a brilliant French woman has written. "We have been protected long enough. The only protection to grant women is to cease protecting them."[1] . . .

We have seen that when the Catholic development of the archaic conception of marriage as a sacrament, slowly elaborated and fossilized by the ingenuity of the Canonists, was at last nominally dethroned, though not destroyed, by the movement associated with the Reformation, it was replaced by the conception of marriage as a contract. This conception of marriage as a contract still enjoys a considerable amount of credit amongst us.

There must always be contractive elements, implicit or explicit, in a marriage; that was well recognized even by the Canonists. But when we treat marriage as all contract, and nothing but contract, we have to realize that we have set up a very peculiar form of contract, not voidable, like other contracts, by the agreement of the parties to it, but dissoluble as a sort of punishment of

[1] Similarly in Germany, Wanda von Sacher-Masoch, who had suffered much from marriage, whatever her own defects of character may have been, writes at the end of "Meine Lebensbeichte" that "as long as women have not the courage to regulate, without State interference or Church interference, relationships which concern themselves alone, they will not be free." In place of this old decayed system of marriage so opposed to our modern thoughts and feelings, she would have private contracts made by a lawyer. In England, at a much earlier period, Charles Kingsley, who was an ardent friend to women's movements, and whose feeling for womanhood amounted almost to worship, wrote to J. S. Mill: "There will never be a good world for women until the last remnant of the Canon law is civilized off the earth."

delinquency rather than by the voluntary annulment of a bond.[1] . . .

As a matter of fact marriage is not a true contract and no attempt has ever been made to convert it into a true contract. . . .

If marriage were really placed on the basis of a contract, not only would that contract be voidable at the will of the two parties concerned, without any question of delinquency coming into the question, but those parties would at the outset themselves determine the conditions regulating the contract. But nothing could be more unlike our actual marriage. The two parties are bidden to accept each other as husband and wife; they are not invited to make a contract; they are not even told that, little as they may know it, they have in fact made a very complicated and elaborate contract that was framed on lines laid down, for a large part, thousands of years before they were born. Unless they have studied law they are totally ignorant, also, that this contract contains clauses which under some circumstances may be fatal to either of them. . . .

Marriage is, therefore, not only not a contract in the true sense,[2] but in the only sense in which it is a contract it is a contract of an exceedingly bad kind. . . .

It thus tends to come about that with the growth of civilization the conception of marriage as a contract falls more and more into discredit. It is realized, on the one hand, that personal contracts are out of harmony with our general and social attitude, for if we reject the idea of a human being contracting himself as a slave, how much

[1] Hobhouse, *op. cit.*, vol. I, p. 237.

[2] I may remark that this was pointed out, and its consequences vigorously argued, many years ago by C. G. Garrison, "Limits of Divorce," Contemporary Review, Feb., 1894. "It may safely be asserted," he concludes, "that marriage presents not one attribute or incident of anything remotely resembling a contract, either in form, remedy, procedure, or result; but that in all these aspects, on the contrary, it is fatally hostile to the principles and practices of that division of the rights of persons." Marriage is not contract, but conduct.

more we should reject the idea of entering by contract into the still more intimate relationship of a husband or a wife; on the other hand it is felt that the idea of pre-ordained contracts on a matter over which the individual himself has no control is quite unreal and when any strict rules of equity prevail, necessarily invalid. . . .

We have seen that the modern tendency as regards marriage is towards its recognition as a voluntary union entered into by two free, equal, and morally responsible persons, and that that union is rather of the nature of an ethical sacrament than of a contract, so that in its essence as a physical and spiritual bond it is outside the sphere of the State's action. . . .

And the more we investigate the tendency of the modern marriage movement the more we shall realize that its attitude of freedom, of individual moral responsibility, in the formation of sexual relationships, is compensated by an attitude of stringency, of strict social oversight, in the matter of procreation. . . .

The necessity for such an undertaking is double, even apart from the fact that it is in the highest interests of the parents themselves. It is required in the interests of the child. It is required in the interests of the State. A child can be bred, and well-bred, by one effective parent. But to equip a child adequately for its entrance into life both parents are usually needed. The State on its side — that is to say, the community of which parents and child alike form part — is bound to know who these persons are who have become sponsors for a new individual now introduced into its midst. The most Individualistic State, the most Socialistic State, are alike bound, if faithful to the interests, both biological and economic, of their constituent members generally, to insist on the full legal and recognized parentage of the father and mother of every child. That is clearly demanded in the interests of the child; it is clearly demanded also in the interests of the State. . . .

If we turn from the Canonists to the writings of a modern like Ellen Key, who so accurately represents much that is most characteristic and essential in the late tendencies of marriage development, we seem to have entered a new world, even a newly illuminated world. For "in the new sexual morality, as in Correggio's 'Notte,' the light emanates from the child." [1] . . .

We can scarcely doubt that we are approaching a time when it will be generally understood that the entrance into the world of every child, without exception, should be preceded by the formation of a marriage contract which, while in no way binding the father and mother to any duties, or any privileges, towards each other, binds them both towards their child and at the same time insures their responsibility towards the State. It is impossible for the State to obtain more than this, but it should be impossible for it to demand less. A contract of such a kind "marries" the father and mother so far as the parentage of the individual child is concerned, and in no other respect; it is a contract which leaves entirely unaffected their past, present, or future relations towards other persons, otherwise it would be impossible to enforce it. . . .

If — to sum up — we consider the course which the regulation of marriage has run during the Christian era, the only period which immediately concerns us, it is not difficult to trace the main outlines. Marriage began as a private arrangement, which the Church, without being able to control, was willing to bless, as it also blessed many other secular affairs of men, making no undue attempt to limit its natural flexibility to human needs. Gradually and imperceptibly, however, without the medium of any law, Christianity gained the complete control of marriage, coördinated it with its already evolved conceptions of the

[1] Ellen Key, "Liebe und Ehe," p. 168; *cf.* the same author's "Century of the Child."

evil of lust, of the virtue of chastity, of the mortal sin of fornication, and, having through the influence of these dominating conceptions limited the flexibility of marriage in every possible direction, it placed it on a lofty but narrow pedestal as the sacrament of matrimony. For reasons which by no means lay in the nature of the sexual relationships, but which probably seemed cogent to sacerdotal legislators who assimilated it to ordination, matrimony was declared indissoluble. Nothing was so easy to enter as the gate of matrimony, but, after the manner of a mouse-trap, it opened inwards and not outwards; once in there was no way out alive. The Church's regulation of marriage while, like the celibacy of the clergy, it was a success from the point of view of ecclesiastical politics, and even at first from the point of view of civilization, for it at least introduced order into a chaotic society, was in the long run a failure from the point of view of society and morals. On the one hand it drifted into absurd subtleties and quibbles; on the other, not being based on either reason or humanity, it had none of that vital adaptability to the needs of life, which early Christianity, while holding aloft austere ideals, still largely retained. On the side of tradition this code of marriage law became awkward and impracticable; on the biological side it was hopelessly false. The way was thus prepared for the Protestant reintroduction of the conception of marriage as a contract, that conception being, however, brought forward less on its merits than as a protest against the difficulties and absurdities of the Catholic Canon law. The contractive view, which still largely persists even to-day, speedily took over much of the Canon law doctrines of marriage, becoming in practice a kind of reformed and secularized Canon law. It was somewhat more adapted to modern needs, but it retained much of the rigidity of the Catholic marriage without its sacramental character, and it never made any attempt to become more than

nominally contractive. It has been of the nature of an incongruous compromise and has represented a transitional phase towards free private marriage. We can recognize that phase in the tendency, well marked in all civilized lands, to an ever increasing flexibility of marriage. The idea, and even the fact, of marriage by consent and divorce by failure of that consent, which we are now approaching, has never indeed been quite extinct. In the Latin countries it has survived with the tradition of Roman law; in the English-speaking countries it is bound up with the spirit of Puritanism which insists that in the things that concern the individual alone the individual himself shall be the supreme judge. That doctrine as applied to marriage was in England magnificently asserted by the genius of Milton, and in America it has been a leaven which is still working in marriage legislation towards an inevitable goal which is scarcely yet in sight.

The marriage system of the future, as it moves along its present course, will resemble the old Christian system in that it will recognize the sacred and sacramental character of the sexual relationship, and it will resemble the civil conception in that it will insist that marriage, so far as it involves procreation, shall be publicly registered by the State. But in opposition to the Church it will recognize that marriage, in so far as it is purely a sexual relationship, is a private matter the conditions of which must be left to the persons who alone are concerned in it; and in opposition to the civil theory it will recognize that marriage is in its essence a fact and not a contract, though it may give rise to contracts, so long as such contracts do not touch that essential fact. And in one respect it will go beyond either the ecclesiastical conception or the civil conception. Man has in recent times gained control of his own procreative powers, and that control involves a shifting of the center of gravity of marriage, in so far as

marriage is an affair of the State, from the vagina to the child which is the fruit of the womb. Marriage as a state institution will center, not around the sexual relationship, but around the child which is the outcome of that relationship. In so far as marriage is an inviolable public contract it will be of such a nature that it will be capable of automatically covering with its protection every child that is born into the world, so that every child may possess a legal mother and a legal father. On the one side, therefore, marriage is tending to become less stringent; on the other side it is tending to become more stringent. On the personal side it is a sacred and intimate relationship with which the State has no concern; on the social side it is the assumption of the responsible public sponsorship of a new member of the State. Some among us are working to further one of these aspects of marriage, some to further the other aspect. Both are indispensable to establish a perfect harmony. It is necessary to hold the two aspects of marriage apart, in order to do equal justice to the individual and to society, but in so far as marriage approaches its ideal state those two aspects become one.

CHAPTER XLIII

THE PARENT CONTRACT SYSTEM CONTRASTED WITH THE MARRIAGE SYSTEM [1]

[1.] That parenthood is the central fact in the theory of the family none will nowadays dispute; that it should be the only fact, that family and parenthood should be convertible terms, few will admit. And yet until these few become many I question if there be any way out of the maze in which our theories of parenthood and of marriage, particularly marriage, are lost. I mean that until marriage and parenthood get into the social consciousness as distinct and separable facts, our ethics — and our conduct — will be uncertain, confused, and tragical beyond need.

There have been several reasons for this confusing identification in theory of the facts of marriage and parenthood. Any habitual association is apt to seem to us a necessary association. Only owners of apartment houses or members of boards of education need be reminded that marriage and parenthood form one of these habitual associations. Moreover their association in practice in

[1] [By Elsie Clews Parsons: A.B. (1896) Barnard College; Ph.D. (1890) Columbia University; lecturer on sociology, Barnard College, 1899–1905; lecturer in anthropology, New School of Social Research (N. Y.) 1919; president American Folk-lore Society, 1919–20.

Her writings include: Tarde, "The Laws of Imitation" (1903, translation); "The Family" (1906); "Religious Chastity" (1913, under the pen name, John Main); "The Old-Fashioned Woman" (1913); "Fear and Conventionality" (1914); "Social Freedom" (1915); "Social Rule" (1916).

The selection above reprinted is from her essays entitled "Parenthood" and "Parenthood and Marriage," first published in International Journal of Ethics, vols. XXIV, XXV, respectively. Parts have been omitted.]

our type of family, the monogamous simple family of two generations, is particularly striking, more striking than in the polygamous family or in the compound family of three generations. There are other factors confirming the identification. Since because of certain economic and religious traditions I need not particularize, our unmarried mothers and their children are severely penalized, the idea of parenthood divorced from marriage is repugnant and disconcerting. Again, so disquieting and distressing is passionate love in itself to those who see it and at times to those who feel it that it is ever subject to restrictions or inhibitions of all kinds. Many of these inhibitions are ideas about its nature. The idea that it is weakening or demoralizing is such an idea, an idea that has been rooted deep among us by our religion. In particular, Christianity at one time worked up the idea of the evil intrinsic in passion into the theory that passion had to justify itself through the begetting or bearing of offspring.

This special dogma we have rejected. We have even begun to question the theory back of it, pleading that although passion may not under all circumstances be its own justification, it does not always need an extraneous justification. We have begun to question other traditions. Are the elders, we ask, they who feel least the impulses of sex, the fittest to regulate them? Nor does the influence of the habitual association appear to be quite as controlling among us as once it was. As a matter of fact, the prevalence of childless marriage is breaking down the particular association we are discussing, marriage and parenthood. Furthermore, although the unmarried mother is still penalized, from our devotion to childhood at large the illegitimate child has become a beneficiary.

And so I venture to predict the time when in social theory, but (mind you) not necessarily in actuality, marriage and parenthood will be divorced. Then marriage, or shall we say any relation of sex, may be considered

a private matter in which the State has no interest and no voice. Parenthood on the other hand will be accounted of public significance and of far greater public concern than it is to-day. Then, instead of a marriage registry and a divorce court we may have a parent's registry and a parent's court; instead of a marriage certificate, a parent's certificate (already in embryo in the eugenic certificate); instead of matrimonial property laws, parent contract law.

[2.] Parent contract sounds, I admit, rather fanciful, and so a word or two about its commonsense aspect. Under our present family system, a mixture of custom and law, the State interferes little if at all in family affairs until they are in a mess, in far too much of a mess to be straightened out by the clumsy mechanism of law. (Any one who has ever had anything to do with a divorce trial is quite well aware of this.) The State does undertake to say in a general way that a parent, primarily a father, in his default a mother, should be responsible for the support and education of a minor child. To standardize that support and education the State has never undertaken, nor has it undertaken, except in the most uncertain terms, to regulate the foursided relation the existence of a child presupposes, a relation between its mother, its father, society, and the child itself. In the new body of parental law one foresees as the outcome of changes now taking place in public opinion, this four-sided relationship is going to be worked out. But the plan I am suggesting is merely a frame for our theory, not a legislative program. Legislation does not proceed by programs.

In the parent's registry I see the expectant parents, both or either — whether both or only one, or if only one, which one, are questions of indifference in law — I see parents legally bound to enter into a contract [1] with the

[1] I do not use the term contract in its legal sense; the lawyer will tell me I am referring here to the police powers of the State.

State to bring up the child according to the standardized minimum requirements formulated by the State for the good of its future citizen. I also see a provision made in this parent's contract for the support of the mother of the child during pregnancy and for a given period after childbirth. This provision may be made by the expectant mother herself, by the expectant father, or by the State. The residence and control of the child will also be contracted for. In brief, I see the same provisions made amicably and with foresight before the birth of the child that are now made in many cases in the divorce court — with friction and pain.

It seems hardly necessary to go into the details of the legal methods to be adopted by the State to enforce the parent's contract, or into the ways the pressure of public opinion would work on the irresponsible parent, the parent who broke his or her contract and shifted or tried to shift his or her responsibility upon the other parent or upon the State. Nor need I forestall the ridicule sure to greet any idea of anticipating parenthood except through the implications of a wedding, — ridicule that will persist until the momentous and comparatively new knowledge of how to regulate conception has acquired social recognition. I would like to point out, in conclusion, however, that the machinery of a parent's registry and a parent's court is much less compulsory and in some ways much less radical in character than may at first appear. It leaves a man and a woman free to coöperate in a family life. It also leaves either man or woman free not to cooperate. Both systems are worked now. All it does is to help the individual to open his or her eyes to his or her acts, and to help the public to place responsibilities where they belong, but this is — something.

[3.] Having pointed out the need in ethical theory of a distinction between mating and parenthood, let us now particularize certain effects of this distinction, remarking

in general that sex relationships will be considered private relationships, self-centering, appreciated or depreciated for themselves, and that parental relationships will be considered public relationships, centering about the child.

I. MATING

The Minimum Age for Mating. — The standards are formulated in law as "the age of consent" and 'the age of consent at marriage." In many of our States below the age of consent at marriage parental consent is required.

The age of consent is a definition for rape. Below the age of consent sexual intercourse is rape — providing, we note, as one of the confusions on this subject in public opinion, providing it occurs outside of marriage.[1] This confusion is a consequence of the proprietary theory of marriage, a theory making tenable the idea that within marriage rape is not conceivable.

Excepting the married below the age of consent from the law on rape and validating marriage below the age of consent at marriage through parental consent are facts which point to the interest originally expressed by age regulations — parental and marital proprietorship.[2] Age regulations were not at all concerned with the welfare of the young person. That concern the rationalizer and the sentimentalist have read into them,[3] only characteristically to befog the question and put off consideration of the real interest, the fact of immaturity.

Whatever conclusion we may come to when we really begin to think about it, analyzing our vague "too young to marry" ideas, the age of consent and the age of consent at marriage will be necessarily the same, since they bear

[1] The term marriage will be used throughout in the sense of the legal relationship.

[2] See Howard, G. E. A., "History of Matrimonial Institutions," vol. 1, on child marriage and age of consent.

[3] A parent is better able to choose a mate than the young person, is one of their irrelevant contentions.

upon exactly the same relation, the relation between immaturity and sexual intercourse, bearing upon it, too, solely from the standpoint of the young person herself or, let me add, himself. Parental consent will cease to figure; the only obligation of the State or the only concern of the public will be the protection of youth. Reformulated and reduced to a single term, the age of consent will probably be identified with the legal age of majority.

The Minimum Age for Childbearing.[1] — It seems unnecessary to go into the reasons why this subject has received no direct collective attention, important as it is to the public, more important even, since more inclusive, than the minimum age of mating. With coincidence between mating and childbearing no longer necessary, the minimum age to conceive becomes open to discussion. Here again the only consideration is the welfare of the individuals directly concerned, the potential mother and her child. Should she be fully mature or not before she conceives? Mature physically or mature in every way? And what position is open for collective action? If the State is to pursue the policy of eugenic or parents' certificates, the age of the parents will be considered, the certificate refused to persons below the standardized age. Obviously refusal would not preclude the birth of children to immature parents, but it would help establish a new standard for conditions proper for conception, the new standard we shall discuss later for illegitimacy.

Seduction. — In the suit for damages which parents or husbands [2] may bring, the interest is again one of parental or marital proprietorship. The breach of promise suit brought by the woman herself is the outcome of the same

[1] This subject should be classified obviously under parenthood. It is so regularly introduced, however, into discussions of early mating, introduced, I may say, to utter confusion, that the better to emphasize *its distinction from the subject of minimum age for mating*, I too am disposed to take it up out of order.

[2] Suit for the alienation of affection. By one of the false analogies society so often makes, this suit may also be brought by a wife.

proprietary theory — as a matrimonial chattel the woman has been damaged and depreciated. As a seller of herself in the marriage market she is to be compensated. This proprietary theory of betrothal or of seduction is already passing.[1] It will yield in time to a new conception of seduction, to defining it as any deception in courtship by either woman or man as to what she or he would take from or give to the other. Seduction so defined must be accounted a private offense, an offense quite outside collective jurisdiction. Moreover it is a region where any outsiders, even "family or friends," may well fear to tread. On the other hand, consideration of the conditions which facilitate seduction is well within the province of both the family and the State, within the province of any educator of youth. Knowledge about sex renders the seduction of either women or men difficult. In sex relations, if anywhere, ignorance and helplessness go together. And yet seduction or betrayal may be due not only to a general ignorance of sex but to misplaced trust in a particular man or woman. If a woman is unwilling to conceive, for a man not to act accordingly is a betrayal. To make a man believe that he will be the father of a child not begot by him is another form of betrayal, a more generally recognized form. As to the false promise to support offspring of an union, the promise which would correspond under the new regimen to promise to marry under the old, let us postpone its discussion until we consider in general the parent's contract.

Adultery. — Seduction of a woman already mated is an affair of the State only when the State endorses the theory of marital proprietorship. Nor in the new definition we have given the term is seduction any affair necessarily of the first mate. If a person is living in adultery, *i.e.*, in a

[1] The breach of promise suit has become a mere instrument of legal blackmail; but that the law on promise of marriage (or, let me add, on alimony) has never been attacked by feminists is an ironical situation anti-feminists might well make more of.

covert relationship, he or she may be practicing seduction, *i.e.*, deception in love making — or not. Adultery is almost as ambiguous a term as marriage. If we continue to use it, we should understand it to mean a sex relationship with two men or with two women, covert to one or the other or to both. The element of covertness is the essential feature. Into those subtle questions which covertness raises for ethical theory, I would not enter in this discussion.

Polygamy. — Adultery in the current definition is not necessarily either a covert or a plural relationship. In the definition advanced, it is both. For the overt plural relationship we are again driven into old terms, for polygamy as we now use the word may be both a covert and a single relationship. Incidentally, let me remark that, when we begin to take sex relationships seriously in themselves and not merely from the point of view of other relationships or of outsiders, we shall realize the poverty and inadequacy of our terminology. It is, however, singleheartedness in mating we are now discussing. It, too, is a subtle and very complex question. Let me merely suggest that, with the right to privacy established for sex relations and freedom for self-determination, many of the problems of singleheartedness will disappear, its extraneous and artificial problems, such perplexities, for example, as protecting in the eyes of the public one's matrimonial honor or dignity as well as many of the questions raised to-day in getting a divorce. But other questions will, of course, remain, questions arising out of individual differences and individual variability, questions of jealousy, questions of habit. And yet even these conflicts, one ventures to say, will be vastly mitigated by the principle of privacy in sex relationships. With the conditions for privacy more or less formalized and their observance a conventionality, with the advertisement of a sex relationship discountenanced, the spirit of monopoly

towards another will be condemned, even getting the habit of being always with another will be discouraged. The causes of jealousy will be lessened. Moreover, under natural conditions, singleheartedness, genuine singleheartedness, will be more likely to arouse singleheartedness. The monogamist by nature will be less likely to mate with one of polygamist tendencies.

Prostitution. — To this subject I refer in conclusion merely to state why I need not refer to it at all. By the new distribution of ethical values which we foresee, prostitution is little if at all affected,[1] perhaps because of all sex relationships prostitution has always been considered for itself. At any rate it would seem that, whatever the practical conditions in prostitution in need of a collective remedy, conditions of preventable disease, for example, or of trade in prostitutes, on the whole the theoretical attitude of the community needs no reforming. The relation arising in prostitution is already adjudged a private relationship — except of course where reglementation prevails. In itself, subject though it is to adventitious frauds, it is a frank relationship, neither man nor woman deceives the other. It is an extremely imperfect, *i.e.*, partial relationship, and by all is it so regarded. Social disapprobation, to be sure, does not fall equally upon the sexes, but that is because in prostitution the sexes do not have corresponding parts. In prostitution, men commit an offense against sex; women are members of a despised economic caste. Against sex, women prostitutes may not be offenders at all, their occupation being entirely economic. Society's caste prejudices are far stronger than its still embryonic feeling about offenses

[1] Although of all sex topics it is the most under current discussion and of all the most subject to attempts to change its values. Collectively disapproved of, its reform is, I suggest, a *safer* subject to discuss than marriage reform; it is in discussion as it is in practice a kind of scapegoat for marriage, an outlet for the dissatisfaction felt about the collectively approved forms of mating. It becomes therefore in contemporaneous plays and novels the object of the crassest kinds of sentimentality.

against sex. It is undemocratic of society to demean the services it pays for, services it thinks it can not get on without and yet does not much value, or to segregate any economic class — house servants, clergymen, or prostitutes — but it is not strictly a part of a discussion of sex ethics to criticise society for its failures in democracy.

II. PARENTHOOD

In considering the minimum age for childbearing, I referred to the use of parent's certificates. In the earlier discussion the suggestion had been that parent's certificates take the place of marriage licenses and parent's contracts supersede marriage contracts. More of this substitution.

Illegitimacy. — The only form of illegitimacy now recognized refers to the sex relationship of the parents. Into our substitute view this relationship will not enter. The health conditions under which the child is conceived will be paramount. Parents of an improper age or otherwise physically defective, uncertified parents, will be accounted illegitimate. Parents neglecting to contract with the State about the care and bringing up of the child will also be considered illegitimate, *i.e.*, parents shifting their responsibility to the State. In other words, illegitimacy will refer to parents only, not to offspring, and to parents in so far as they shirk their responsibilities both to their offspring and to the State.

Free Motherhood. — Upon which parent do these responsibilities fall? Upon the mother or the father? Under the parent contract system I have suggested, the responsibility may be assumed by either parent or by both. However deeply concerned society may be about the advantage to the child of having two parents, the State must hold itself indifferent. Without trespassing upon the right to privacy in sex relations, the fact of paternity cannot be compulsorily established. The State cannot

afford to search for paternity. Maternity, on the other hand, needs no proof. It is upon the mother, therefore, that the State, if need be, must place the final responsibility. There are other reasons for holding a mother more responsible than a father, ethically more acceptable reasons for considering a foundling more to the discredit of its mother [1] than its father. During pregnancy, at least, if not during infancy, it is the mother who must care for the child.[2] From natural circumstances, also, the final responsibility for conception, except in case of rape, is hers. She has more opportunity [3] to understand the actual conditions necessary to impregnation. That nature places the final responsibility for childbearing upon the woman seems to me axiomatic, incontrovertible. That it is controverted in certain feminist circles, is due, I think, to the persistence of the very institutional ideas about women that feminists in general oppose, the proprietary ideas that make of women irresponsible beings to be cared for since they are possessed. Until women assume a larger measure of responsibility about childbearing, hardly can they expect a larger control of their children. Free motherhood is dependent upon responsible motherhood.

Maternity Insurance and Mothers' Pensions. — By responsible motherhood I do not mean wholly independent, economically independent motherhood, not at least in the near future. Lack of economic training and limitation of economic opportunity bear at present too hard on women to enable them to be economically independent during certain periods of childbearing and rearing. In course of time I foresee young women working to insure themselves against the day of economic unproductivity, to insure

[1] Assuming the stigma of bearing a fatherless child is removed. Then and only then is deserting an infant an indisputably shameful act.

[2] To the argument that she has therefore contributed before the birth more than her share of care, I can only rejoin that it is the logic of life that responsibility increases with increase of function.

[3] Under normal circumstances. The opportunity a woman is deprived of through faulty education I do not take into account.

themselves for maternity. Even to-day they might well begin to transfer to that end the energy they now give to catching husbands or to unpaid labor at home. In return for that labor they might well ask their family to help them pay their maternity premiums. To see that your daughter was well insured for maternity might take the place among parental obligations of seeing she had a dowry. Such a system of maternity insurance might develop into an adequate provision under normal circumstances. But for special cases and at present more generally the State should be called upon to coöperate with the overhandicapped mother. It should maintain homes for expectant or convalescent or nursing mothers. Its maternity hospitals should be greatly increased and its outpatient obstetrical service. It should continue its experiments in mothers' pensions.

Mothers' pensions must be viewed as a highly tentative plan, and as a plan perhaps to meet emergencies rather than normal circumstances. For normally I would not shift the support of a child from its mother to the State. The situation we are discussing is one where the woman cannot both care for the child and earn enough to support it as well as herself. It is just the same situation that a man alone with a child must face. And as he would meet that situation, so must a woman. He or she has to place the child under the care of others and then work for its support. The risk of not being able to care for her child herself is the risk an economically independent woman must run. It is the price the theory of free motherhood cannot escape paying.

Paternity. — In practice, however, one sees no reason why it should often be paid or, at any rate, paid unwillingly. Under the parent contract system a woman would continue to be free to coöperate with the father of her child instead of with the state. Legally she would be as free indeed as she is now to shift the entire responsibility

for the child upon its father or, base enough, upon its supposititious father. She would be as free to insist upon a man's undertaking a parent's contract before there were any possibility for conception as she is now to insist upon a marriage contract. To meet the circumstances of seduction, suit to enforce a promise to enter into a parent's contract might even take the place of suing for breach of promise to marry. A woman would not only be free, we may conclude, not to join in making the parent's contract; very often, generally in fact, she would be urged, I surmise, to stay out of it. I see no reason why men would be more ready to relinquish the support and control of their children under a parent's contract system than under the present marriage system.

Under the parent's contract system, a man as well as a woman would be free to make the contract he preferred, having but to choose for the mother of his children the woman who agreed with him about the distribution of functions in the family. One of the advantages of the parent's contract system to a man would be the proof that it is able to afford that he is really getting the kind of woman he wants, be she the old-fashioned clinging vine type of woman or the *émancipée*.

CONCLUSION

Unobscured by questions about offspring and therefore the more readily detached from the tentacles of the proprietary theory, the theory of sex relations may be foreseen to work out its own salvation, introducing the principle of reciprocity between the sexes and for both men and women setting new standards of sincerity, honor, and responsibility. These standards will also be set in the theory of parenthood. Illegitimacy will be redefined, defined not from the standpoint of an illicit sex relationship, but from the standpoint of the child. The stigma of parental irresponsibility will attach to parents of chil-

dren begot or conceived under circumstances injurious to the children themselves. Greater economic responsibility will attach to women and they will have proportionately greater freedom of maternity. To men as well as to women parenthood will become a more voluntary and therefore a more significant enterprise.

This shifting of values, let us be advised, will by no means be a harbinger of Utopian conditions. It is no guaranty against sex conflicts or undeveloped types of parenthood. Nor is a parent's contract system a panacea. It does not provide, for example, for a change in a parent's earning capacity, much less for a change of heart. No social machinery can be contrived to adequately meet the changes of life or to preclude spiritual inadequacy or disaster. All that new social machinery can do is to advertise that the flotsam of a traditional and inept morality has been removed to let flow the current of a finer and a truer spiritual life.

CHAPTER XLIV

MARRIAGE AS AFFECTED BY MODERN CONDITIONS [1]

All the romance of the world, most of its poetry, and a large part of its serious literature have drawn their inspiration from love, mating and marriage. But what is of far greater importance is the fact that anything which affects the institutions of marriage and the family extends to the very foundations of society, and thus it is that the problems of marriage and divorce are inevitably linked with the welfare of the race.

Current discussions of these problems have served to reveal the wide diversity of opinion that exists in regard to them. In constant succession, arguments appear in favor of divorce and against divorce, intermingled with demands for sweeping reforms in our present marriage system and denunciations of such revolutionary ideas.

Religion and politics, science and philosophy, all play their parts in these discussions, each offering a different solution of the problems involved and presenting such a confusing mass of affirmations and contradictions as to make it extremely difficult for the average reader to reach any definite conclusions. And yet it is manifestly impossible to get an intelligent grasp on these subjects without examining, analyzing and comparing all facts and arguments entitled to consideration.

[1] [By William E. Carson: born, 1870. His works include "Mexico" (N. Y., 1909); "Northcliffe" (N. Y., 1918).
The selection above reprinted is from his "The Marriage Revolt" (New York: Hearst's International Library, 1915), pages 1–35 (parts omitted).]

Furthermore, while arguments based on old doctrines or new theories are interesting, yet in this practical age facts usually carry more weight than arguments, and this is especially true in regard to the problems of marriage and divorce. They are scientific problems of the most complicated character, as well as of the highest importance to society, and, therefore, in order to gain a complete understanding of them it is necessary to reach for facts in every direction.

At the outset, it may be remarked that, divorce being the counterpart of marriage, the two subjects cannot be logically considered apart. Divorce is the sequel of unsuccessful marriage; consequently to ascertain the cause of the rapid growth of divorce, it is necessary to begin by investigating the reasons for the vast increase of matrimonial failure. It is clear, moreover, that divorce will always be governed by the prevailing doctrines of marriage. Formerly, when the sacramental idea of marriage was universally held, there were comparatively few divorces; in these days, the more general recognition of marriage as a civil institution has removed many of the obstacles to liberal divorce customs and legislation, and hence there has been a marked increase of divorce.

This modern view of the marriage relation has given rise to much controversy, and it forms the principal feature of most of the current discussions. On one side we find conservative opinion upholding the sacramental idea of marriage and opposing freedom of divorce, while, on the other hand, liberal opinion regards marriage as a civil contract which, like all other contracts, may for various reasons be canceled. In proceeding to our study it is necessary to consider these points of difference somewhat more in detail.

According to the conservative view of marriage, which is emphasized by most of the Christian churches, marriage is not only to be regarded as a sacrament, but as of lifelong

duration. Those who take this view are convinced that civilization depends upon the preservation of the matrimonial institution as at present constituted; and not only do they regard the increase of divorce as an evil which menaces the stability of family life, but one which exerts an immoral influence on society at large. The spread of radical ideas on marriage, and the increasing laxity regarding the permanence of the marriage bond are consequently viewed with deep concern by the conservative element.

For the purpose of remedying these supposed evils the upholders of conservatism favor the enactment of laws designed to make marriage more binding and the obtaining of divorce far more difficult than at present. To this demand a large body of the public, clinging to traditional ideas of marriage, readily gives support. Conservative opinion expresses its disapproval of radicalism chiefly through the press and by means of public movements for the suppression of the "divorce evil." It has undoubtedly had an important effect on legislation, for while the divorce laws of the various States differ in regard to the grounds for divorce, they practically agree in their restrictive purpose.

In direct opposition to the conservative view there is what may be termed the liberal idea of marriage. Those who take this side of the argument believe that marriage should be regarded solely as a civil institution, completely exempt from any ecclesiastical control; that the churches, in short, have no connection whatever with marriage from the legal point of view. The whole tendency of modern civilization, it must be admitted, is towards a general recognition of the civil character of marriage and an acceptance of the principle that divorce should be granted for any reasonable cause.

Among those who take the liberal view there is an impression that the present marriage system, inherited

from past ages, fails to answer modern needs and aspirations in certain of its aspects, and therefore requires modifying or reforming; that like all other social institutions it is capable of further development and improvement. Divorce, they are convinced, instead of being an evil is usually productive of good. In other words, from their point of view, divorce is a remedy provided by society for the relief of matrimonial ills that can be cured in no other way.

In spite of these wide differences of opinion, there is, nevertheless, one point on which the new and the old schools of thought apparently agree. An examination of the views of the most radical writers, and those whose conservatism is equally pronounced, would probably show that all are agreed in recognizing one ideal of marriage. This ideal is represented by the union based upon attraction and mutual choice, animated by singleness of purpose, sympathy and love, enduring and lifelong. Evolved through long ages of developed human consciousness, this ideal remains fixed and eternal. Resting upon no artificial basis, it has been formed through the gradual advancement of mankind and the improvement of the race. In recognizing this fundamental ideal of marriage radical and conservative meet in complete accord.

Such an ideal, however, like every other human ideal, is not always possible of attainment. Experience has shown, indeed, that only in exceptional cases is it ever fully attained. All the proverbs of the ages, dealing with matrimony, point to this conclusion. While every normal, healthy-minded man and woman undoubtedly believes in this ideal of marriage, yet, with fallible human nature, it is not surprising that mistakes occur and that many marriages are productive of nothing but misery. Realizing this, society has had to enact divorce laws and establish divorce courts in order to provide relief. And it is on this question of divorce that the advocates of liberal and

conservative views — despite their agreement concerning the ideal marriage — come into direct conflict. . . .

As the result of modern conditions a severe strain has been put on the marriage bond in even the best circumstances, while it is becoming increasingly difficult for sociologically bad marriages to continue, whereas under former conditions they were not even discovered to be bad. Those who have reached this conclusion — and among them are some eminent men — regard the increasing number of marriage failures and the accompanying growth of divorce as "costs of progress" arising from causes not necessarily evil, which are destined, in the end, to lead to new and better conditions. The causes responsible for divorce, they believe, cannot be influenced by restrictive laws and are beyond the control of any legislation. . . .

It is further argued that while conservatism upholds traditional notions of marriage, disapproves of all innovations and condemns divorce, yet the very fact that a large element of the public has adopted the liberal view furnishes conclusive proof that in spite of all opposition new ideas of marriage are spreading. At the present time there is undoubtedly a widespread revolt against the bondage of tradition in relation to marriage. Startling views on this subject are being expressed by men and women who are classed among the world's foremost thinkers, and in progressive countries they have done much towards causing a relaxation of the laws of marriage and divorce. While this uprising against convention does not necessarily mean that there is any tendency towards free-love or other license, it shows clearly that the liberal thought of the world is insisting that the conditions of marriage shall be made to conform to the ideas of the present age. . . .

Conservative opinion, in former generations, was so strongly opposed to any change in traditional ideas of marriage and the subjection of womankind, that it was

impossible to foresee the present economic independence of women, their entry into business life and their higher ideals of marriage. Conservative society was then convinced that the prevailing conditions of marriage could not be improved upon and believed that the subjection of women was natural and proper. When the first women reformers demanded equal rights for their sex and denied that the household was woman's only sphere, their ideas were regarded as scandalous, immoral and unwomanly.

To-day, when changed economic, educational and social conditions, with a higher degree of public enlightenment, have contributed to give women a proper share of their just rights and privileges, nobody believes that women should be absolutely controlled by men or that women should be debarred from public life. On the contrary, it is recognized that our social system improves in proportion as the men in it are influenced by good women, and that woman's wider sphere of activity is destined to work for the benefit of humanity. . . .

The substitution of mechanical for physical power has thus brought about a rearrangement of the forces of production and a redistribution of the population. It has also built our modern industrial cities. With the productivity of labor and capital marvelously increased, the rapid accumulation of capital has been made possible. Coincident with this, there has been the development of steam-power and the uses of electricity, the growth of the newspaper, the factory system, foreign immigration and the great migration to the West. All these tended to single out the individual from the groups to which he belonged and to treat him from the egoistic basis. Instead of his duties his rights were magnified and his difficulties were solved from that point of view.

Not only have the spread of individualism and the changes in family life served to modify popular views of

marriage, but a similar influence has been exerted through the lessening importance of the home. Whereas in former times one of the principal objects of marriage was the establishment of a permanent home, this idea is becoming less general, an increasing number of married couples having no homes in the conventional meaning of the term. It is of importance, therefore, to consider the effect of social progress on domestic life, and to ascertain to what extent it has changed traditional ideas of marriage.

During the last century the home has been affected in various ways. The progress of the Sunday school and the development of the public school system, for example, have taken away its former influence as an educational force. Not only has home life been transformed, but the home itself seems likely to disappear eventually. While this applies more especially to our larger cities, yet even in country districts the home has lost much of its former importance. The stockings that were knit, the bread that was baked, the shoes that were made and the tinkering that was done around the old homestead exist only in song and story, for the progress of the factory system has put an end to all that. Pickling, preserving, quilting and various other household industries are rapidly passing away, and the storekeeper increasingly supplies what the housewife formerly produced. Labor-saving machines and devices, such as carpet-sweepers, automatic washers, bakers, broilers, wringers, sprinklers, ironers and coal-sifters are reducing household work to a minimum even in country places, while in the cities gas and electric ranges are banishing drudgery from the kitchen.

As the result of these changes, the average American home is becoming simply a lodging-house, where a man eats his morning and evening meals, sleeping there and occasionally stopping there on Sundays. Occupation, education and recreation are all furnished outside the home. In the larger cities the rise and development of the

apartment hotel and other forms of coöperative housekeeping probably foreshadow the home life of the future when coöperation will become general. Not only have these developments helped to change the status of the home and the family, but every form of social activity has been complicated and a multitude of new problems are having their effect on married life, and incidentally on the growth of divorce. In other words, the present increase of divorce is due fundamentally to the deeper movements of modern civilization.

While in all departments of life there has been this constant substitution of the new for the old, with continuous advancement in every direction, there has also been evolved within the last fifty years that most important of all modern movements, the progress of women towards complete economic independence.

The economic changes in this period, which have caused the disappearance of so many home industries, have forced women into wider fields of activity, causing them, in increasing numbers, to enter the various trades, commercial pursuits and professions to become self-supporting. This has not only had an important effect upon social life, but also upon the problems of marriage and divorce; for the economically independent woman is a very different being from the secluded, dependent woman of former generations, and with the advent of this new era of womanhood new ideas of marriage have arisen, while certain new ethical standards have been established. . . .

By convenient means of living the necessity for family life has been still further reduced, and this fact has had an important influence on marriage, for in this country and in Europe, during recent years, there has been a marked decrease of marriages in proportion to population. The boarding house, the furnished flat or the club now supply two important factors which once made many

men dependent upon married life, and to a lesser degree this also applies to women.

While these changes have been in progress the standard of education and intelligence has been steadily raised among the masses, new ideas of life and its purposes tending to supplant those of former times. The comforts of living have been increased, together with their cost, and the luxuries of a generation ago have become the necessities of to-day. Not only are the children of those who work for a daily wage clothed at a greater expense than were those of the well-to-do not so many years ago, but better and longer school education is required, while more is spent in travel, and for theaters or other amusements. The difficulty is, of course, in the adjustment of the returns of individual effort and service to the demands of social life in these days, but that is being gradually arranged.

Compared with even the last century, the present age is an age of luxury; and the demand for luxury and what seems to be an increase of extravagance among the masses, are having a serious effect on both marriage and divorce. Young men and women, for example, are less willing than were their fathers and mothers to practice economy and undergo discomfort in married life in order to establish a home. Then the fact that the average young woman can support herself tends to make her more independent and far less submissive to a husband's restrictions. Moreover, the increasing desire on the part of young women to be independent and to have careers of their own, at least prior to marriage, has given a new spirit to wifehood. This is tending to abolish the dependent position of married women with their pitiful asking for money which has hitherto been considered inseparable from woman's economic position. The woman who can earn her own living will not tolerate the wrongs or injustices in married life which women once endured. She insists upon her

constitutional right to liberty and the pursuit of happiness, and this spirit of independence has undoubtedly been one of the prime factors in the increase of divorce.

The insistence upon a greater degree of freedom in married life is not confined to women, but, to an increasing extent, is shared by both sexes, and this has had some influence in reducing the marriage rate. It must be admitted, however, that those who are deterred from marrying because of modern conditions are usually people of some culture. . . .

But by far the most insidious change in the conditions governing marriage has been neither economic nor industrial. The fact must be faced that whereas fifty years ago marriage meant the inevitable birth and rearing of children, it carries no such assumption to-day.[1] The proportion of deliberately sterile unions has increased to such an extent that it is impossible any longer to deduce from the marriage of any particular couple that they will have any children or even that they desire or intend to have any. There are various reasons for this condition. One of these may be traced to the strain of modern living, which has an injurious effect on the feminine physique and has caused child-bearing to be dreaded by the overwrought woman of the present day. . . .

From the facts that have been presented, it must be obvious that no matter how desirable the attainment of the traditional ideals of marriage might be in some respects, it has been rendered increasingly difficult. To attempt to force new conditions into conformity with old standards is, in fact, to repeat a familiar mistake, one akin to that of putting new wine into old bottles, and breakage is bound to follow. That in matters of marriage to-day new conditions and old ideals should so often

[1] The size of families in the United States, it is said, has steadily declined since the first census was taken in 1790. A decline in the birth rate and reduction in the size of families is, however, a worldwide phenomenon common to all civilized nations, Germany alone excepted, and is most noticeable in the city populations of all countries.

conflict is not surprising, nor is it strange that the question should be so often asked, whether the institution of matrimony does not need some readjustment to meet the requirements of the present age. . . .

The astonishing fact that, at the present time, every twelfth marriage in this country ends in divorce certainly gives strong support to the arguments of those who assert that conventional ideas of marriage do not agree with modern standards. Nor does this increase of divorce necessarily mean that human nature has become worse or that sociologically vicious unions are more numerous than they were formerly. What seems more probable is that men and women of intelligence are making greater demands in the way of comfort and happiness in married life, and that the pressure due to changes in ideas and social environment is operating to render sociologically bad marriages unendurable.

That in these days men and women have become exceedingly complex is a fact which impresses most observers, and thus, with the progress of time, an increasing strain is being put upon the marriage bond. While in former times, there was, for example, little danger of a married couple developing latent tastes that might prove dissimilar, it has been remarked that to-day such instances are common and oftentimes lead to divorce. Under modern conditions, complete harmony, at the age of twenty-five, may mean open conflict twenty years later when individual ideas and preferences have had a fuller development. Men and women to-day are not only less influenced by traditional ideas, but even the influences of religion are perceptibly losing their hold on great numbers of people. Added to this, the increasing acceptance of the civil contract theory of marriage, with a consequent lessening of any stigma attaching to divorce, has tended to remove certain restrictions once considered inseparable from married life.

An interesting fact, which has been left to the last, but which, from its importance, must not be overlooked, concerns the relations of the sexes in this country. According to the census of 1910, the masculine population exceeded the feminine by 2,693,156, and of the population over fifteen years of age there was a masculine preponderance of 2,378,480. This condition of the population, which is peculiar to countries of comparatively recent settlement, and practically the reversal of conditions in the old world, seems to deserve a degree of consideration which it has not yet received from students of the marriage problem. If it has any meaning at all in relation to a society based on strict monogamy, it means that there are, in the United States, some two millions of males for whom there are no mates of the opposite sex. . . .

It would seem that such a disturbance of balance between the sexes would result not only in an automatically higher status of women, considered merely as women, together with enormously increased competition for their society and coöperation as wives, but also in lending to the attitude of a proportion of them toward their suitors and husbands a degree of exaction and independence based upon the instinctive knowledge of this competition. The disruptive effect upon individual homes of a large masculine population for whose units, however desirable and necessary marriage may seem to appear to them, there exist no women at all, is written large in the returns of increasing divorce. Before elementary necessity the sanctity of the home ceases to operate as an effectual deterrent in the competition of men for women, which continues even after the marriage of the latter. It is also possible that the surplus of men has the effect of holding constantly before the individual woman, married or single, glittering opportunities of increased material prosperity as well as of greater matrimonial happiness in return for the commission of infidelity or mere delay in choosing a

mate — opportunities which cannot fail to affect her imagination, and which are frequently observed to affect her conduct.

From the facts presented in this chapter it is not only clear that ideas and conditions of marriage have changed materially in the last hundred years, but that our present marriage system is still in process of development. While there is no tendency towards the abolition of marriage or a disregard of its fundamental principle, there has undoubtedly been a widespread approval of certain new ideas, of which the increasing enactment of liberal divorce laws is but one instance. It has been further shown that new ideas and conditions clash with the conventional notions upheld by conservatism, and that this has given rise to demands for radical reforms in marriage. It has also been shown that what is called conservatism and loyalty to tradition has oftentimes consisted in an effort to prolong the ghostly existence of deceased ideas and doctrines: that radical ideas are not necessarily evil nor change always harmful. No matter how much evil may exist, we are solving our problems and are doing it by a gradual process that will eventually give us the desired results without endangering the welfare of society.

Briefly summing up the facts that have been presented, we find that there has been an increasing recognition of the civil contract theory of marriage and a growing appreciation of individual rights; that the coercive maintenance of marriage when all natural ties have been severed is meeting with increasing condemnation; and that the more general acceptance of these ideas has led to a greater resort to divorce. We have found, furthermore, that not only have ideals of marriage changed and moral standards been modified, but the advent of new social and economic conditions has transformed the home and domestic life generally. Added to this, the

childless unions or limitation of offspring, later marriages, the higher cost of living, less need for home life and greater demands for individual happiness have all had their effect on marriage and incidentally on the growth of divorce.

CHAPTER XLV

EDUCATION AS A CURE FOR DIVORCE[1]

The divorce movement is dependent upon social forces which lie far beyond the reach of the statute-maker. Yet it seems almost certain that there is a margin, very important though narrow, within which he may wisely exert a restraining influence. Good laws may, at any rate, check hasty impulse and force individuals to take proper time for reflection. They may also by securing publicity prevent manifold injustice in the granting of decrees.

After all, in this fact do we not catch a glimpse of the proper sphere of divorce legislation? Divorce is a remedy and not the disease. It is not a virtue in a divorce law, as appears to be often assumed, to restrict the application of the remedy at all hazards, regardless of the sufferings of the social body. If it were always the essential purpose of a good law to diminish directly the number of *bona fide* divorces, the more rational course would be to imitate South Carolina and prohibit divorce entirely. Divorce is not immoral. It is quite probable, on the contrary, that drastic, like negligent, legislation is sometimes immoral. It is not necessarily a merit, and it may be a grave social wrong, to reduce the legal causes for a decree to the one "scriptural" ground. The most enlightened judgment of

[1] [By George Elliott Howard: born at Saratoga, N. Y., Oct. 1, 1849; A.B. (1876), Ph.D. (1894), University of Nebraska; professor of political science and sociology since 1906, University of Nebraska.
His works include: "Local Constitutional History of the United States" (1889); "Development of the King's Peace" (1891); "History of Matrimonial Institutions" (1904).
The selection above reprinted is from his "History of Matrimonial Institutions" (Chicago: University of Chicago Press, 1904), vol. III, pages 219–235, 250–255 (parts omitted).]

the age heartily approves of the policy of some states in extending the causes so as to include intoxication from the habitual use of strong drinks or narcotics as being equally destructive of connubial happiness and family well-being. Indeed, considering the needs of each particular society, the promotion of happiness is the only safe criterion to guide the lawmaker in either widening or narrowing the door of escape from the marriage bond. The divorce movement is a portentous and almost universal incident of modern civilization. Doubtless it signifies underlying social evils vast and perilous. Yet to the student of history it is perfectly clear that this is but a part of the mighty movement for social liberation which has been gaining in volume and strength ever since the Reformation. According to the sixteenth-century reformer, divorce is the "medicine" for the disease of marriage. Certain it is that one rises from a detailed study of American legislation with the conviction that, faulty as are our divorce laws, our marriage laws are far worse; while our apathy, our carelessness and levity, regarding the safeguards of the matrimonial institution are wellnigh incredible. Indeed, there has been a great deal of misdirected and hasty criticism of American divorce legislation. Even thoughtful scholars sometimes indulge in the traditional arraignment. The laws of the American states produced since 1789, declares Bryce, present "the largest and the strangest, and perhaps the saddest, body of legislative experiments in the sphere of family law which free self-governing communities have ever tried." Such sweeping assertions are in many ways misleading and fail to advance the solution of the divorce problem. There is, of course, in the aggregate a "large" body of statutes; for each of the fifty-three commonwealths, on this subject as on all others, has a separate code; but the harm resulting either from the bulk or the perplexity of the laws, while needing a remedy, is not so serious as is commonly assumed. More

and more in their essential features the divorce laws of the states are duplicating each other; and there is already ground for hope that in reasonable time they may attain to practical uniformity. . . .

THE FUNCTION OF EDUCATION

It is needful in the outset, as already suggested, frankly to accept marriage and the family as social institutions whose problems must be studied in connection with the actual conditions of modern social life. It is vain to appeal to ideals born of old and very different conditions. The guiding light will come, not from authority, but from a rational understanding of the existing facts. Small progress can be expected while leaning upon tradition. . . .

From the infancy of the human race, the monogamic family has been the *prevailing* type. There have been, it is true, many variations, many aberrations, from this type under diverse conditions, religious, economic, or social. Under changing influences the inter-relations of the members of the group — of husband and wife, of parent and child — and their relations individually and collectively to the state, have varied from age to age or from people to people. There have been wife-capture, wife-purchase, and the *patria potestas*. But in essential character — at first for biological, later for ethical or spiritual reasons — the general tendency has always been toward a higher, more clearly differentiated type of the single pairing family. Moreover, setting aside all question of special priestly sanctions, the healthiest social sentiment has more and more demanded that the "pairing" should be lasting. Whether of Jew or gentile, the highest ideal of marriage has become that of a lifelong partnership. Are these tendencies to remain unbroken? Is the stream of evolution to proceed, gaining in purity and strength? Are marriage and the family doomed; or are they capable of adaptation, of reform and development, so as to satisfy

the higher material and ethical requirements of the advancing generations? Seemingly they are now menaced by serious dangers. Some of them have their origin in the new conditions of a society which is undergoing a swift transition, a mighty transformation, industrially, intellectually, and spiritually; while others, perhaps the more imminent, are incident to the institutions themselves as they have been shaped or warped by bad laws and false sentiments. Apparently, if there is to be salvation, it must come through the vitalizing, regenerative power of a more efficient moral, physical, and social training of the young. The home and the family must enter into the educational curriculum. Before an adequate sociological program can be devised the facts must be squarely faced and honestly studied. In the sphere of domestic institutions, even more imperatively than in that of politics or economics, there is need of light and publicity.

The family, it is alleged, is in danger of disintegration through the tendency to individualism which in many ways is so striking a characteristic of the age. Within the family itself there are, indeed, signs that a rapid transition from status to contract is taking place in a way which Maine scarcely contemplated; for he appears to have imagined that precisely in this sphere the process was already virtually complete. The bonds of paternal authority are becoming looser and looser. In America in particular young men and even young women earlier than elsewhere tend to cut their parental moorings and to embark in independent business careers. So also more and more clearly the wife is showing a determination to escape entirely from *manu viri* — still sustained by the relics of mediæval law and sentiment — and to become in reality as well as in name an equal partner under the nuptial contract. The state also has intervened to abridge the parental authority. Minor children are no longer looked upon as the absolute property of the father. Thus, little

by little, to use the phrase of a thoughtful writer, the original "coercive" powers of the family under the patriarchal *régime* have been "extracted" and appropriated by society. The real danger is that the family and the home will surrender an undue share of their duty and privilege to participate in the culture and training of the young. This function for the good of society may be vastly developed, though mainly on new lines bearing directly on the nature of marriage and the family. Of this function some further mention will presently be made.

More threatening to the solidarity of the family is believed to be the individualistic tendencies arising in existing urban and economic life. With the rise of corporate and associated industry comes a weakening of the intimacy of home ties. Through the division of labor the "family hearth-stone" is fast becoming a mere temporary meeting-place of individual wage earners. The congestion of population in cities is forcing into being new and lower modes of life. The tenement and the "sweating system" are destructive of the home. Neither the lodging-house, the "flat," nor the "apartment" affords an ideal environment for domestic joys. In the vast hives of Paris, London, or New York even families of the relatively well-to-do have small opportunity to flourish — for self-culture and self-enjoyment. To the children of the slum the street is a perilous nursery. For them squalor, disease, and sordid vice have supplanted the traditional blessings of the family sanctuary. The cramped, artificial, and transient associations of the boarding-house are a wretched substitute for the privacy of the separate household.

For very many men club life has stronger allurements than the connubial partnership. Prostitution advances with alarming speed. For the poor, sometimes for the rich, the great city has many interests and many places more attractive than the home circle. The love of selfish indulgence and the spirit of commercial greed, not less

than grinding penury, restrain men and women from wedlock. Yet the urban environment has also the opposite effect. In the crowded, heterogeneous, and shifting population of the great towns marriages are often lightly made and as lightly dissolved. Indeed, the remarkable mobility of the American people, the habit of frequent migration, under the powerful incentives of industrial enterprise, gold-hunting, or other adventure, and under favor of the marvelously developed means of swift transportation, will account in no small degree for the laxity of matrimonial and family ties in the United States. May not one gather courage even from this untoward circumstance? Assuredly the present thus clearly appears to be an age of transition to a more stable condition of social life. Furthermore, the perils to the family of the kind under review need not be fatal. They are inherent mainly in economic institutions which may be scientifically studied and intelligently brought into harmony with the requirements of the social order. Already in great municipal centers, through improved facilities for rapid transit, the evils resulting from dense population are being somewhat ameliorated. Of a truth, every penny's reduction in street-railway fares means for the family of small means a better chance for pure air, sound health, and a separate home in the suburbs. The dispersion of the city over a broader area at once cheapens and raises the standard of living. Every hour's reduction in the period of daily toil potentially gives more leisure for building, adorning, and enjoying the home.

To the socialist the monogamic family in its present form is decidedly a failure. "To those who would substitute common ownership for industrial liberty, the institution of the family presents one of the most persistent obstacles. Domestic unity is inconsistent with the absolute social unity vested in the state." The larger social body must be composed of individual members, free and

equal; and it will not tolerate within itself a smaller body with special group-interests of its own, much less with any vestige of coercive authority over its constituent parts. There must be no *imperium in imperio*. Writers like Engels seek consolation and support in Bachofen's theory of a universal stage of mother-right before the monogamic family with the institution of private property had brought domestic slavery into the world. They "hold that the monogamic family is a relic of decaying civilization. All ideas on which it rests, the subordination and dependence of women, the ownership of children, the belief in the sacredness of marriage as a divine institution, above all respect for the individual ownership of property and the rights of inheritance as permanent elements in our social organization — have been undermined. The foundations are sapped and the superstructure is ready to topple in."

Woman in particular has been the devoted victim of the greed of individual possession upon which the monogamic family rests. "Far back in history," according to Edward Carpenter, "at a time when in the early societies the thought of inequality had hardly arisen, it would appear that the female, in her own way — as sole authenticator of birth and parentage, as guardian of the household, as inventress of agriculture and the peaceful arts, as priestess and prophetess or sharer in the councils of the tribe — was as powerful as man in his, and sometimes even more so. But from thence down to to-day what centuries of repression, of slavehood, of dumbness, of obscurity have been her lot!"

Under socialism, declare Morris and Bax, marriage and the family will be affected "firstly in economics and secondly in ethics. The present marriage system is based on the general supposition of economic dependence of the woman on the man, and the consequent necessity of his making provision for her." In the new social order this

degrading condition must disappear. "Property in children would cease to exist, and every infant that came into the world would be born into full citizenship, and would enjoy all its advantages whatever the conduct of its parents might be. Thus a new development of the family would take place, on the basis, not of a predominant lifelong business arrangement, to be formally and nominally held to, irrespective of circumstances, but on mutual inclination and affection, an association terminable at the will of either party." Thus a higher morality would be sanctioned. There would be no "vestige of reprobation for dissolving one tie and forming another."

A similar demand for liberty is made by Laurence Gronlund. Economically "the coming commonwealth" will place woman "on an equal footing with man." But she will be "equal," not "alike"; for in the new society the sexes will no longer be free industrial competitors, but each will have its special vocation. Physiological differences will not be ignored. "Woman will become a functionary, she will have suitable employment given her, and be rewarded according to results, just the same as men." Like men she will have suffrage, not as a right or a privilege, but as a trust. "The new order will necessarily, by the mere working of its economic principles, considerably modify" the marriage relation; and "is that relation such an ideal one now, that it would be a sacrilege to touch it? Is marriage not now, at bottom, an establishment for the support of woman? Is not maintenance the price which the husband pays for the appendage to himself? And because the supply generally exceeds the demand — that is, the effective demand — has woman not often to accept the offer of the first man who seems able to perform this pecuniary obligation?" If it be objected that this is taking "rather a commercial view" of the "holy" relation, is not, "as a matter of fact, marriage regarded by altogether too many as a commercial

institution? Do not, in fact, the total of young women form a matrimonial market, regulated by demand and supply?" "Now the Coöperative Commonwealth will dissipate this horror," enabling every healthy adult man and woman to find a mate. Thus, contrary to false charges, socialists are not trying to destroy the family: "they want to enable every man and woman to form a happy family!" Modern democracy revolts against the patriarchal constitution of the family, upon whose model all feudal and ancient societies were organized. In the "very nature of things family-supremacy will be absolutely incompatible with an interdependent, a solidaric, commonwealth; for in such a state the first object of education must be to establish in the minds of the children an indissoluble association between their individual happiness and the good of all."

The manifold social evils which take their rise directly or indirectly in marriage as it is — be the actual causes what they may — have always justly aroused the unsparing criticism of socialistic writers. Thus to Robert Owen — whose pure life was unreservedly and courageously devoted to the social good, as he understood it — marriage was a member of his "trinity of causes of crime and immorality among mankind." With almost the fanatical zeal of an apostle of a new religion, he railed at the "single" family. He proclaimed the glad tidings of the swift approach of the new moral order. Then "the imaginative laws of the marriages of the priesthood must be among the first to be abolished, by reason of their extended injurious influence upon human nature, poisoning all the sources of the most valuable qualities which Nature has given to infant man. These marriages have dried up the fountain of truth in human nature; they perpetually insinuate that man can love and hate at his pleasure, and that to be virtuous he must live according to the dictates of the laws and ceremonies devised by the

priesthood, that he must hate according to the same dictation, and that if he does not thus love and hate, he is vicious, and he will be eternally punished in another world," while on earth he will suffer from the human laws and by the public opinion which priests have inspired. Under the new moral order all this will be changed. Marriages will be more lasting than now. "Every individual will be trained and educated, to have all his powers cultivated in the most superior manner known; cultivated too under a new combination of external objects, purposely formed, to bring into constant exercise the best and most lovely qualities only of human nature." Wealth for all will be "produced in superfluity." Therefore all will be "equal in their education and condition," and without any distinction except as to age. "There will be then no motive or inducement for any parties to unite, except from pure affection arising from the most unreserved knowledge of each other's character. . . . There will be no artificial obstacles in the way of permanent happy unions of the sexes; for . . . the affections will receive every aid which can be devised to induce them to be permanent;" and the wedded pair "will be placed as far as possible in the condition of lovers during their lives." In "some partial instances," however, happiness might not even thus be secured. In such event, "without any severance of friendship between the parties, a separation may be made, the least injurious to them and the most beneficial to the interests of society." In fine, Robert Owen's book, although often vague in expression and violent in tone, contains in its statements, and still more in its suggestions, practically the whole program of later socialistic writings on the subject of marriage and the family, except the argument based on historical evolution.

Robert Dale Owen followed in his father's footsteps. He finds even the Haytian institution of "placement" —

an informal union made and dissolved at the pleasure of the contracting persons — far superior in its morality and its stability to the sacramental marriage which exists by its side.

August Bebel, in his able book on *Woman and Socialism*, draws a powerful indictment of matrimonial relations under the existing order. To this source, in his view, may be traced the prevalence of sexual crimes and the most dangerous tendencies now threatening the integrity of society. Infanticide, abortion, and prostitution; the decline in the birth and marriage rates; the increase in the number of divorces; the subjection of woman — all these, he says, are due mainly to the influence of the present "coercive marriage." This is so because that "marriage is an institution bound up in the closest way with the existing social order and with it must stand or fall." Coercive marriage is the creature of economic conditions, the "normal marriage" of the present bourgeois society; and with that society it is already in process of disruption. "Since all these unnatural conditions, being especially harmful to woman, are grounded in the nature of the bourgeois society and are growing with its duration, that society is proving itself incapable of remedying the evil and of emancipating woman. Another social order is therefore needful for this purpose." In the new state, economically and socially, woman will be entirely independent. She will no longer be the subject of authority and of exploitation; but, free and equal by man's side, she will become "mistress of her own destiny."

Whatever may be thought of the remedy suggested by socialistic writers, whether or not our only hope lies in the coöperative commonwealth, it is certain that they have rendered an important public service. They have earnestly studied and set forth the actual facts. With unsparing hand they have laid bare the flaws in our domestic institutions as they really exist. They have clearly

proved that the problems of marriage and the family can be solved only by grasping their relations to the economic system. They have shown that progress lies along the line of the complete emancipation of woman and the absolute equality of the sexes in marriage. In accomplishing all this they have in effect done much to arouse in the popular mind a loftier ideal of wedded life. . . .

We are thus confronted by still another phase of the emancipation movement — the divorce problem. In this problem woman has a peculiar interest. The wife more frequently than the husband is seeking in divorce a release from marital ills; for in her case it often involves an escape from sexual slavery. The divorce movement, therefore, is in part an expression of woman's growing independence. In this instance as in others it does not, of course, follow that the individualistic tendency is vicious. Nowhere in the field of social ethics, perhaps, is there more confusion of thought than in dealing with the divorce question. Divorce is not favored by any one for its own sake. Probably in every healthy society the ideal of right marriage is a lifelong union. But what if it is not right, if the marriage is a failure? Is there no relief? Here a sharp difference of opinion has arisen. Some persons look upon divorce as an evil in itself; others as a "remedy" for, or a "symptom" of, social disease. The one class regard it as a cause; the other as an effect. To the Roman Catholic, and to those who believe with him, divorce is a sin, the sanction of "successive polygamy," of "polygamy on the instalment plan." At the other extreme are those who, like Milton and Humboldt, would allow marriage to be dissolved freely by mutual consent, or even at the desire of either spouse. Nay, there are earnest souls, shocked by the intolerable hardships which wives may suffer under the marital yoke, who, pending a reform in the marriage law, would, like the Quakers of earlier days, ignore the present statutory requirements and resort to private

contract. According to the prevailing opinion, however, as expressed in modern legislation, divorce should be allowed, with more or less freedom, under careful state regulation. Whatever degree of liberty may be just or expedient in a more advanced state of moral development, it is felt that now a reasonable conservatism is the safer course. Yet divorce is sanctioned by the state as an individual right; and there may be occasions when the exercise of the right becomes a social duty. The right is, of course, capable of serious abuse. Loose divorce laws may even invite crime. Nevertheless, it is fallacious to represent the institution of divorce as in itself a menace to social morality. It is not helpful to allege, as is often done, that with the increase of divorce certain crimes wax more frequent, thus insinuating the effect for the cause. It is just as illogical to assume that the prevalence of divorce in the United States is a proof of moral decadence as compared with other countries in which divorce is prohibited or more restricted. To forbid the use of a remedy does not prove that there is no disease. Is there any good reason for believing that what Tocqueville said fifty years ago is not true to-day? "Assuredly," he declares, "America is the country in the world where the marriage tie is most respected and where the highest and justest idea of conjugal happiness has been conceived." It is remarkable, says Lecky, "that this great facility of divorce should exist in a country which has long been conspicuous for its high standard of sexual morality and for its deep sense of the sanctity of marriage." Bryce passes a similar judgment: "So far as my own information goes, the practical level of sexual morality is at least as high in the United States as in any part of northern or western Europe (except possibly among the Roman Catholic peasantry of Ireland)." There "seems no ground for concluding that the increase of divorce in America necessarily points to a decline in the standard of domestic

morality, except perhaps in a small section of the wealthy class, though it must be admitted that if this increase should continue, it may tend to induce such a decline." . . .

This brings us to the root of the matter: the need of a loftier popular ideal of the marriage relation. "An ounce of prevention is worth a pound of cure." While bad legislation and a low standard of social ethics continue to throw recklessly wide the door which opens to wedlock, there must of necessity be a broad way out. How ignorantly, with what utter levity, are marriages often contracted; how many thousands of parents fail to give their children any serious warning against yielding to transient impulse in choosing a mate; how few have received any real training with respect to the duties and responsibilities of conjugal life! What proper check is society placing upon the marriage of the unfit? Is there any boy or girl so immature if only the legal age of consent has been reached; is there any "delinquent" so dangerous through inherited tendencies to disease or crime; is there any worn out debauchee, who cannot somewhere find a magistrate or a priest to tie the "sacred" knot? It is a very low moral sentiment which tolerates modern wife-purchase or husband-purchase for bread, title, or social position. . . .

It is vain to conceal from ourselves the fact that here is a real menace to society. Marriages thus formed are almost sure to be miserable failures from the start. It is the simple truth, as earnest writers have insisted, that often under such conditions the nuptial ceremony is but a legal sanction of "prostitution within the marriage bond," whose fruit is wrecked motherhood and the feeble, base-born children of unbridled lust. The command to "be fruitful and multiply," under the selfish and thoughtless interpretation which has been given it, has become a heavy curse to womanhood and a peril to the human race. On the face of it, is it not grotesque to call such unions

holy or to demand that they shall be indissoluble? What chance is there under such circumstances for a happy family life or for worthy home-building? In sanctioning divorce the welfare of the children may well cause the state anxiety; but are there not thousands of so-called "homes" from whose corrupting and blighting shadow the sooner a child escapes the better for both it and society?

How shall the needed reform be accomplished? The raising of ideals is a slow process. It will not come through the statute-maker, though he can do something to provide a legal environment favorable for the change. It must come through an earnest and persistent educational effort.

CHAPTER XLVI

THE SPIRITUAL JUSTIFICATION OF MONOGAMY [1]

In this book marriage means such a union of one man and one woman as is described in the Christian marriage service. For various reasons such an ideal union is not always attained in modern "civilized" communities. But of late we have been told by certain "advanced" writers that it ought not to be attained, or retained, any longer. Other institutions, they say, — the State, the Church, — have been radically transformed; but marriage, at least in theory, has retained its old-fashioned shape, which, according to G. B. Shaw, suits only a small minority of the (English) people. Is it not time for matrimony to join the march of evolution and be brought up to date?

Moral and spiritual growth certainly ought to take place in the marriage relation, but it is often forgotten that change and growth are not the same. Change may be so radical as to destroy growth. Forest fires and popular crazes are changes which abolish development. Nothing grows unless it has a central core of identity which does not change. A tree can be changed into parlor matches, but it cannot grow parlor matches like leaves.

[1] [By Richard C. Cabot: born at Brookline, Mass., May 21, 1868; A.B. (1889), M.D. (1892), Harvard University; since 1919 professor of medicine, Harvard Medical School.

His works include: "Clinical Examination of the Blood" (1896); "Serum Diagnosis of Disease" (1901); "Case Histories in Medicine" (1906); "Social Service and the Art of Healing" (1909); "Differential Diagnosis" (1911, 1915); "What Men Live By" (1914).

The selection above reprinted is from his "What Men Live By" (Boston: Houghton Mifflin Co., 1918), chapter XIX (parts omitted).]

The State can grow only so long as some idea of government persists. It can decay into anarchy, but it cannot grow into anarchy, because no "it" is left to grow.

So marriage will not grow but decay if it "outgrows" its fundamental purpose. But before considering radical changes, would it not be well to give it fair trial? We can hardly say that marriage has been fairly tried, as long as man remains so fitfully and imperfectly monogamic as he now is. Let us call to mind what can be said, first in defense, then in praise, of the plan to make it a fact instead of — as now — an ideal. . . .

A sound defense of monogamy must justify first of all its exclusiveness: — "Forsaking all others, keep thee only unto her so long as ye both shall live." Of course this does not mean that married people shall not make friends among both sexes. It can only mean that there shall be in marriage a core of primary intimacies shared with no other human being. The law insists only upon the physical and economic side of this primacy. So long as a man does not commit adultery, so long as he supports his wife and is not cruel, or, in variously defined ways, intolerable, to her, the law is satisfied. It makes no attempt to buttress the spiritual privacy of the marriage, but on the physical side the law stands for absolute privacy. Whatever else is shared, this shall not be shared. It is for the public good that the marital relation shall not be public or promiscuous. So says the law.

Yet such exclusiveness is contrary to the general trend of the times. We are less and less tolerant of exclusive rights and private ownership. Hence it is natural that a considerable wing within the Socialist party should be opposed to all legal sanctions for the exclusiveness of marriage.

The justification of any sort of exclusiveness is its fruits in character. Tradition, law, and public opinion have

been guided thus far by the belief that character, service, and happiness are best built up through affections which are to some extent exclusive because they are loyal to the objects of their own free choice. Is this reasonable?

Let us draw some parallels from outside the field of married love. It is generally agreed that in the choice of a country, an occupation, or a residence there should be, if possible, finality. A man who wanders from country to country soon becomes a "man without a country." He is usually unhappy and amounts to little. . . .

Very rare in my acquaintance are the people who have changed from trade to trade and yet succeeded in any. The rolling man gathers no skill because he is not faithful to any job long enough to learn the soul of it, or to get its best rewards. May it not be the same with the "free lover"? While attracted to one mate, he perceives the counter-attractions of others. He is not narrow-minded. He recognizes beauty and goodness everywhere and wishes a generous share of both. But precisely similar counter-attractions offer themselves to every man who has set himself to do a piece of work. The other man's job, like the other man's wife, often looks more attractive than his own. Few men stick to their work because they are perpetually in love with it and never in love with any other. They stick to it because they have learned to believe that nobody accomplishes anything unless he binds himself to resist his momentary impulses and to learn one trade as thoroughly as he can. Moreover the best rewards of work, financial and personal, usually come late. To leave one job for another usually means to leave it before we have got the best of it or given it our best service.

To go from city to city within one's country is probably commoner in America than elsewhere, and no one deprecates changes made before we have chosen a place to live. The preliminary survey of many places, if one can afford

it, is as wise as it is to see many possible mates before one marries. But when the choice of a place to live has once been made, every one regards it as an evil, though perhaps a necessary evil, to move away.

These choices — of country, residence or job (or mate) — are usually exclusive. In taking one we reject many, and often find the rejection very painful. Like a polygamist, we want to grasp several of the alternatives offered. But we have learned the necessity of sacrifice, not only for moral reasons, but from pure prudence. If we try for several, we lose all. Moreover, most of these choices, since they are final, involve not only exclusiveness and sacrifice at the start, but devotion all the way along. No man likes his business every day: sometimes he loathes it; yet he knows that to throw it up and try another, or to drift about, would be crazy. He learns to disregard or to crush his impulses of repulsion for his job. He must "make good" in it whether he feels like it or not.

All this we Americans have learned in business because work is the thing we have learned best. But in love a wave of indifference or dislike is taken very seriously, perhaps interpreted to mean "time for divorce" or "right to be unfaithful." We are foolish enough to expect constancy of feeling in love, though we know that in everything else our feelings vary like the weather. . . .

It appears, then, that in many other fields of life we have convincing proof of the principle on which monogamy rests. In science, in art, in practical affairs, in patriotism we habitually select a single interest to which all else then becomes secondary. Would it not be strange, then, if there were no need to establish by marriage such a center?

It is fashionable nowadays to talk of marriage as a contract between husband and wife. . . .

What sort of contract is marriage? How does it differ

from a contract between a housebuilder and a (prospective) householder? First of all in this: Contracting parties are not usually drawn together by any mysterious and elemental attraction. Employer and employee exert, as a rule, no subtle fascination on each other. Their differences have to be adjusted, while the differences of married people are often their most effective bond. Give the complementary differences of sex a chance, and they will work for each other's benefit without pay, without effort and even without capacity. . . .

For the many-sidedness of marriage gives it strength. Even *two* interests shared throw light on each other and on those who share them. Each reflects and multiplies all, like a group of mirrors. Married people share, as a rule, more and more diverse interests with each other than with any one else. Houses, children, sorrows, relations (poor and not so poor), finances, reputations, meals, beds, opinions, prejudices, sickness and health, — who but mates can share so many and so richly varied realities? Who else has the chance to realize with soul and with sense how each reënforces the rest? . . .

Perhaps the greatest blessing in marriage is that it lasts so long. The years, like the varying interests of each year, combine to buttress and enrich each other. Out of many shared years, one life. In a series of temporary relationships, one misses the ripening, gathering, harvesting joys, the deep, hard-won truths of marriage. The unmarried can rarely follow so many strands of interest at once. They share food with one friend, work with another, play with a third, travel with a fourth, failure with a fifth, quarrels with a sixth. But with no human being can they share the light shed by each of these experiences on all the rest. . . .

All security ties some future's hands in order that we may risk something else. Fortified by good health, one may risk money; buttressed by money one may perhaps

risk health. In marriage, the security ordinarily attained is this: there is some one who forgives us more often and more freely than the unmarried can expect; some one who makes God's infinite forgiveness more credible. There is some one who loves us long after we have forfeited any natural right to be loved and long before we have won any. Supernatural in this sense marriage almost always is; thus it prepares and enfranchises us for religion.

In the forefront of my tribute to marriage I have put forgiveness, because I know nothing that we need more. We need it not merely to lighten the burdens of discouragement, but to stir us out of the apathy of habit. Fresh impulse to our work, fresh heart for the impersonations which every art and every game presuppose, new love of life and its author, — such are the issues of forgiveness. Your better half forgives not only your more obvious sins, but your awkwardness (behind which she sees some grace quite hidden to other mortals), your foolishness, your dumbness, your blank and uninspiring face. Despite all these drab exteriors she sees something worth while in you, and because she sees it she helps it to be born.

Forgiveness is to the spirit what home is to the householder. It is the assurance that in the house of the spirit some one waits for our deed, — the deed never yet done, but always due. . . .

So far I have written mostly of strength and of the trials of strength in marriage. So much for the deep root of it. Now for its shoots and branches.

Everybody wants to be understood by somebody; but in the natural course of events everybody is more or less misunderstood or distortedly understood by most of his friends and acquaintances. They have no "call" to pay special attention to him and are rightly engaged in their own business. In heaven, scripture tells us, we

shall know as we are known, wholly; but to most of us this perfect knowledge would be inconceivable but for the glimpses and tastes of it in marriage. Marriage gives us the best chance in sight to grasp our share of complete mutual comprehension. I believe that any benedict among us, the "pick-and-shovel" man, the shipping-clerk, the plumber, or the railroad magnate, is more apt to be understood by his wife than by any other human being. The bachelor and the maid (old or young) are less often appreciated with that ripe mixture of favoritism and keen sight which the married enjoy.

Enjoy it they certainly do. Almost every one wants to pour out his joys, his troubles, and his plans to some one who will meet him halfway. The number of reserved people dwindles towards zero in the intricate understanding of marriage. . . .

Marriage, then, as a great teacher and symbol, bids us, first of all, study the facts, learn our technique faithfully, and play the game for all it is worth, with no shirking of its hard knocks, no fatuous assumption that we know it before we have learned it, no quailing before the twin giants, — Success and Failure, — who are to be enemies or friends as we shall decide. We follow the game wherever it leads. Good winners and good losers we are schooled to become in marriage as in sport. . . .

PART V

PUNISHMENT

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CHAPTER XLVII

A SURVEY OF ETHICAL THEORIES OF PUNISHMENT[1]

Examining the theories which have been brought forward by ethicists in justification of punishment, we find that they may be described as: (1) Retributive, (2) Deterrent, (3) Preventive, and (4) Reformatory, respectively. In determining the value of these theories it will be necessary, as was the case in reference to the theories of justice as applied to the distribution of rewards, to consider them not only from the standpoint of abstract justice, but as to the possibility of realizing them in practice.

The Retributive Theory. — Beginning with the retributive, or as it may also be called, the vindictive, or expiative theory, it is to be observed first of all that, in the strict sense of the word, only that pain may be spoken of as punishment which is imposed simply and solely for the sake of the pain to be felt by the one punished. According to the retributive theory, through punishment the offender expiates his offense, suffers retribution for the evil which has been done, and thus is vindicated the

[1] [By Westel W. Willoughby: born at Alexandria, Va., July 20, 1867; A.B. (1888), Ph.D. (1891), Johns Hopkins University; admitted to bar, and in practice at Washington, D. C., 1891–7; since 1897, professor of political science at Johns Hopkins University.

His works include: "The Supreme Court of the United States" (1890); "Government and Administration of the United States" (1891); "The Nature of the State" (1896); "The Rights and Duties of American Citizenship" (1898); "Social Justice" (1900); "The Political Theories of the Ancient World" (1903); "The American Constitutional System" (1904); "Constitutional Law of the United States" (1910).

The selection above reprinted is from his "Social Justice" (New York: The Macmillan Co., 1900), chapter X (parts omitted).]

principle of justice which has been violated. Thus says Godwin, in his "Political Justice," "Punishment is generally used to signify the voluntary infliction of evil upon a vicious being, not merely because the public good demands it, but because there is apprehended to be a certain fitness and propriety in the nature of things that render suffering abstractly, from the benefit to result, the suitable concomitant of vice." [1]

Accepting this definition which Godwin gives us as the true meaning of punishment, it is necessary to hold that, in so far as a penalty is imposed for any other than a vindictive object, as, for example, for the sake of deterrence, prevention, reformation, or social protection, it ceases to be punishment at all. . . .

Having defined now what is meant by punishment in its proper retributive or expiative sense, we come to the vital question whether a true system of ethics requires, or even permits, the existence of a right to inflict pain for this purpose. In short, can there be stated any rational ground for declaring that justice demands, under any conceivable conditions, that pain should be inflicted when no possible future good can result? If we answer "No," we, of course, deny that the idea of punishment, in its proper sense, should play any part whatsoever in our systems of ethics. . . .

That philosopher who, among modern writers, has defended most absolutely the retributive theory of punishment, is Kant. His views upon this point are to be found in his "Rechtslehre." [2]

"Judicial punishment," says Kant, "can never be administered merely as a means for promoting another good, either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed some

[1] *Op. cit.*, p. 230.

[2] Translated by Hastie under the title "Philosophy of Law."

crime. For one man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the subjects of real right. Against such treatment his inborn personality has a right to protect him, even although he may be condemned to lose his civil personality. He must first be found guilty and punishable, before there can be any thought of drawing from his personality any benefit for himself or his fellow-citizens. The penal law is a categorical imperative; and woe to him who creeps through the serpent-windings of utilitarians to discover some advantage that may discharge him from the justice of punishment or even from the due measure of it according to the Pharisaic maxim: 'It is better that one man should die than that the whole people should perish.' For if Justice and Righteousness perish, human life would no longer have any value in the world. What, then, is to be said of such a proposal as to keep a criminal alive who has been condemned to death, on his being given to understand that if he agreed to certain dangerous experiments being performed upon him, he would be allowed to survive — if he come happily through them? It is argued that physicians might thus obtain new information that would be of value to the commonweal. But a court of justice would repudiate with scorn any proposal of this kind if made to it by the medical faculty; for justice would cease to be justice, if it were bartered away for any consideration whatever." [1]

Kant makes this repudiation of the utilitarian element still more emphatic, when he declares: "Even if a civil society resolved to dissolve itself with the consent of all its members, — as might be supposed in the case of a people inhabiting an island resolving to separate and and scatter themselves throughout the whole world, — the last murderer living in prison ought to be executed before the resolution was carried out. This ought to be

[1] *Op. cit.*, p. 195.

done in order that every one may realize the desert of his deeds, and that blood-guiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of Justice." [1]

The vindictive theory is accepted by Kant not only as furnishing the motive for punishment, but as dictating the character of the penalty to be imposed in each case. The doctrine of *lex talionis* is to be applied without reservation. . . .

What validity is there in this reasoning of Kant? Only this much, we think. It furnishes a satisfactory answer to that school of thinkers who, having not yet thoroughly rid themselves of the social-compact and natural-right theories, declare that all social or political control over the individual, needs, for its justification, the consent of the individual. It is correct to say that in the commission of any given deed, the criminal logically accepts as a valid rule of conduct the principle involved in his act, and therefore that he cannot justly complain if society see fit to subject him to the operation of the same rule that he has already applied in his conduct toward others. But this is all.

Kant says that a person should never be treated merely as a means. But a person is treated merely as a means only when his right to be considered as an end is wholly ignored. Now, when it becomes necessary in the interest of society to inflict an evil upon an individual, that individual is *quâ hoc* treated as a means; but he is also treated as an end, if in estimating the social good his individual good is considered, and in the selection of him for punishment the choice has been controlled by empiric facts which make it productive of more good that he, rather than any one or no one else, should be punished. Thus, just as, according to this interpretation of the

[1] *Idem*, p. 198.

sanctity of human personality, guiltiness of crime cannot of itself justify the infliction of pain; so, conversely, when the social good demands, innocence from wrong-doing cannot always relieve one from the duty of subjecting himself to, or release society from the obligation of imposing, an evil which in extreme cases may amount even to death. . . .

The incorrectness of the retributive theory of punishment becomes manifest when we consider the results to which an attempt to apply it in practice would necessarily lead. In the first place, it would render impossible any penal law whatever, for it would never be possible for courts to gain that knowledge which the theory demands for the just apportioning of penalties. When reduced to their proper meaning, the words retribution, expiation, or vindication, mean the bringing home to the criminal the legitimate consequences of his conduct, that is, legitimate from the ethical standpoint. But this, of course, involves the determination of the degree of his moral responsibility, a task that is an impossibility for any legal tribunal. Conditions of knowledge, of heredity, of training, of opportunities for moral development, of social environment generally, and of motive have to be searched out, which are beyond even the ability of the criminal himself to determine, — far less of others, — before even an approximate estimate can be made of the simplest act. But even could this be done, there would be no possible standard by which to estimate the amount of physical pain to be imposed as a punishment for a given degree of moral guilt. For how measure a moral wrong by a physical suffering? Or, granting what is inconceivable, that such an equivalence could be fixed upon, how would it be possible to inflict upon the culprit just that amount of pain which he might deserve? Individuals differ physically and mentally, and these differences are widened by training and methods of life until it is impossible to

determine the degree of discomfort or pain that a given penalty will cause a given individual. The fear of death itself varies widely with different individuals, and the same is true as to the estimation in which all other forms of evil are held. So far, therefore, from there being any certainty that two individuals will be equally punished who are subjected to the same penitential treatment, there is, in fact, almost a certainty that they will not be.

This question of the moral responsibility in the criminal which the retributive theory necessarily predicates has been rendered doubly embarrassing by the results recently obtained by the new school of criminologists, who term themselves Criminal Anthropologists. By following entirely new methods this school has arrived at conclusions as to the nature and causes of crime differing radically from those which have been formerly held, and which, if they be proved true, must result in almost revolutionary changes in our present penal methods.

Reversing former methods, this school has studied the criminal rather than the crime, and the result of the investigations carried on along this line has been to bring into prominence the conception of the criminal as a being physically and psychically degenerate. Every crime, no matter by whom committed, or under what circumstances, is to be explained in but two ways: either as the act of the individual's free will, or as the natural effect and as the necessary result of social and physical causes. Our present methods of punishment are based upon the idea that a crime is the free act of a person who, actuated by motives of gain or passion, deliberately contravenes the law. Now and then is raised in our courts the plea of insanity or temporary aberration of mind or kleptomania, but in the vast majority of cases the criminal is considered as not differing in body or mentality from honest men. He is considered as wholly responsible for his own act and is punished accordingly.

According to the new school of criminal anthropology, this theory of crime and its punishment is radically wrong. Crime, its members say, is in the great majority of cases due to disease, to a mental state of the criminal which predisposes him to the commission of illegal acts. The study that has been made of the brain and mental peculiarities of those convicted of criminal offenses clearly proves this, they say, to be so. This being so, our penal methods should look primarily to the cure of the criminal and not to his punishment. No man, whatever his offense, should be discharged from restraint except upon reasonable evidence that he is morally, intellectually, and physically capable of leading an honest life. It may sound strange, but it is alleged that it is correct to say that it is as natural for some people to commit crime when under provocation or temptation as it is for a dyspeptic to have indigestion after overeating, or a rheumatic to suffer from the result of exposure. Crime, in short, is due to some fault in his organization which renders the individual less able to withstand temptation or to control improper desires. Whenever in any one's mental outfit there is any maladjustment (and the doctors tell us that none of us are sound in every particular), there is present a tendency to peculiarities that affect our motives and actions. The criminal is, therefore, to be judged as one whose mental peculiarities are such as to make the commission of crime more easy to him than it is to others.

Between the violently insane, the idiot, and the one whose moral faculties are merely blunted, and the sense of right and wrong indistinct, there are all grades of criminality. On the border line of lunacy lie the criminal populations. . . .

The conception of crime as due to defective mental organization of the criminal, explains to us many of the points that have hitherto perplexed us. In the first place, it gives us a reason for the repeated instances in which we

find persons committing crimes where there seems to be no sufficient motive, and when it must be apparent to the ones committing them that immediate discovery and severe punishment are to be the sure result. Murders are frequently committed upon the most trivial grounds, and nothing is more common than to find prisoners who seem to take a genuine delight in thieving, even though not in want. Secondly, the definition of the criminal as one of defective organization, who is on a lower plane of civilization than that on which he is actually living, explains the increase of crime in the face of an advancing civilization and a widening diffusion of wealth and education. With the instincts of a savage, the criminal is forced to live among civilized people. "Criminality, like insanity, waits upon civilization," says Ellis. . . .

Again, the conception of crime as due to pathological condition explains the difficulty of reforming criminals. It explains also why our methods of punishment seem to have so little deterrent effect. It is because they have no power to reform the diseased condition of the prisoner's mind, and are not imposed for that purpose. . . .

Finally, the hereditary nature of criminality shows its character as a disease. The investigations of experts leave no room for doubt upon this point. . . .

The point which is of special interest to us in all this is that, just to the extent to which the thesis is maintained that crime is due to disease, in corresponding degree should, according to the retributive theory, the severity of punishment be relaxed; and where the will is discovered entirely impotent to restrain the instincts and desires of a diseased mind and body, punishment should be wholly remitted. And thus there would logically arise the necessity of declaring the non-amenability to punishment (though not to treatment) of that most dangerous of all social types, the "instinctive criminal." . . .

Before leaving the criticism of the retributive theory,

one other point is to be noticed. This is, that the acceptance of the retributive idea has undoubtedly been influential in dictating to legislators and courts those extraordinary severities of punishments which have unfortunately so characterized the administration of criminal justice in the past. Where it is looked upon as the law's province to mete out punishments equivalent to the moral offense committed, almost no physical suffering can in theory be deemed excessive. For how measure in temporal terms the quantity of a violation, however slight, of the Almighty's will? It was, in fact, by expressly calling back the criminal law to simple utilitarian ends that such writers as Beccaria, Montesquieu, and Bentham were able, by their influence, to put a stop to that vast amount of needless suffering which was the result from the administration of the criminal laws of a hundred years ago.

Revenge. — It will undoubtedly be asked as an objection to repudiating absolutely the retributive idea of punishment, "Is not indignation at a wrong done a righteous feeling; and is it not right to embody this indignation in concrete, effective form in our criminal laws? Is it not right that we should feel a certain satisfaction, and recognize a certain fitness in the suffering of one who has done an intentional wrong? Shall the murderer go unscathed, and the adulterer be freed from the penalty for his crime?"

To these questions we answer that it is right, indeed that it is morally obligatory upon us to feel indignant at a wrong done. But it is not right that we should wish evil to the offender save as possible good can come from that evil. The two feelings are wholly distinct. The one is a feeling of moral revulsion and is directed at the crime. The other is a desire for vengeance, and is directed at the criminal. . . .

To revenge oneself is, in truth, but to add another evil to that which has already been done; and the admission of it as a right is, in effect, a negation of all civil and social

order, for thereby are justified acts of violence not regulated by, nor exercised with reference to, the social good. The idea that in the criminal law the State "avenges" the wrong done to itself and to individuals is, in fact, but a remnant of the old "natural rights" and "social compact" theories, according to which individuals originally had a "right" of self-protection and of vengeance which, when the body politic was formed, was handed over to it for exercise, and that thus the State obtained a just authority to exercise force and punitive power.

There are few who in modern times assert the abstract rightfulness of a desire for vengeance, but among these few is to be found the eminent writer upon criminal law, the late Justice Fitzjames Stephen.[1] The statement of his position upon this point is in the following emphatic terms: "The infliction of punishment by law gives definite expression and a solemn ratification to the hatred which is excited by the commission of the offense, and which constitutes the moral or popular as distinguished from the conscientious sanction of that part of morality which is also sanctioned by the criminal law. The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it." "I am of opinion," he continues, "that this close alliance between criminal law and moral sentiment is in all ways healthy and advantageous to the community. I think it highly desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it."

To the declaration that it is natural and right that we should hate the criminal, if by that is meant that we detest

[1] See his "History of the Criminal Law of England," Chapter XVII,

his crime and are indignant at him for committing it, no objection can be made. Nor can any be made to the assertion that it is well that this hatred should find expression in the law, if by this is meant that a moral influence is exerted by the fact that thus there is stamped in plain and unmistakable terms the disapproval of the sovereign power of the reprobated acts. This we may term the educative service of penal law. . . .

If we accept the literal meaning of the words used, Justice Stephen defends as ethically proper, under certain circumstances, the desire for vengeance. If, however, we examine carefully the thought, we think that it will be found that that which Stephen really has in mind is, after all, that feeling of indignation which we may properly feel at the commission of a wrong, rather than the idea of revenge pure and simple. We think that if Stephen had eliminated from his thought the belief in the possible educative value of the punishment, he would have seen that what would be left would not be a sentiment ethically defensible. . . .

Hegel has often but incorrectly been interpreted as advocating the retributive theory of punishment. The true ground upon which he justifies the deliberate infliction of suffering upon a wrong-doer is that this suffering at least tends to have upon the criminal himself the educative effect of which we have been speaking.[1] Hegel uses the word retribution, but, as the context shows, it is as having this educative sense, and not that of revenge. . . .

The matter is put in a nutshell when Hegel says that in his idea of retribution there is implied no pleasure for the objective will, such as is involved in the idea of revenge, but simply the "turning back of crime against itself. The Eumenides sleep, but crime wakes them. So it is the criminal's own deed which judges itself."[2]

[1] *Cf.* an article by McTaggert entitled, "Hegel's Theory of Punishment," in the International Journal of Ethics, Vol. VI, p. 479.

[2] "Philosophy of Right" (Dyde's trans.), § 101.

Hegel does not deny that the criminal law may be made to serve other purposes than that of awakening the criminal to a true comprehension of the nature of his deed, but this last should ever, he thinks, furnish the fundamental motive. "The treatment of punishment in its character as a phenomenon," he says, "of its relation to the particular consciousness, of the effect of threats upon the imagination, and of the possibility of reform is of great importance in its proper place, when the method of punishment is to be decided on. But such treatment must assume that punishment is absolutely just. Hence everything turns on the point that in crime it is not the production of evil but the injury of right, which must be set aside as overcome. We must ask what that is in crime, whose existence has to be removed. That is the only evil to be set aside, and the essential thing to determine is wherein that evil lies. . . ."

It is scarcely necessary to point out that in abandoning the theory of revenge, Hegel definitely places himself upon the ground that the purpose of punishment should be utilitarian; that is, that its imposition should be for the attainment of some present or future good. His theory, in fact, very much resembles what is generally known as the Reformatory Theory. It differs from that theory, however, in one important respect. While those who accept the reformatory theory desire that one of the aims of our penitential systems should be to awaken the conscience and change the disposition of the criminal, the aim which Hegel has in mind is rather to arouse the comprehension of the wrong-doer to the true nature of his act. The object is thus to stimulate his cognitive faculties, rather than to increase his sense of moral obligation; to show what is right and what is wrong, rather than to teach him that he should do what is right and avoid doing what is wrong. For this reason we have preferred to call Hegel's theory Educative rather than Reformatory.

Hegel has in mind solely the possible educative value of punishment upon the criminal himself. Logically, however, the theory includes the educative influence that it may have upon the community at large. In actual effect, indeed, this may easily be much the more important part of the educational influence exercised by it.

How far it is possible either to educate or reform the criminal by punishment, is a matter upon which persons will naturally differ. Personally we are inclined to believe that it can reform him only as it educates him. With the true nature of his act clearly brought home to him, the conscience of the criminal, so far as it is not already blunted, will then exercise its controlling power to prevent a repetition of the same or similar conduct. But directly to awaken the conscience by a series of pains, if not impossible, is certainly difficult. As Hudibras has said, "No thief e'er felt the halter draw with just opinion of the law;" and as George Eliot in her "Felix Holt" declares, "Men do not become penitent and learn to abhor themselves by having their backs cut open with the lash; rather they learn to abhor the lash."

Perhaps, however, it will be said this does injustice to the reformatory theory. It may be said that those who emphasize the reformatory element in the administration of penal justice maintain, not that the punishment which is inflicted has, or can be made to have, a reforming influence, but that the State should seek to reform the criminals while punishing them.[1] But if this be so, then the theory is not one of punishment at all. For the reformation, if it comes at all, is then the result from the discipline that the prisoner receives, not from the incar-

[1] See on this point the excellent paper of Mr. McTaggert, in the International Journal of Ethics, already quoted, and that of Mr. Rashdall in the same journal (II, 20) entitled "The Theory of Punishment." "When a man is induced to abstain from crime," says Rashdall, "by the possibility of a better life being brought home to him through the ministrations of a prison chaplain, through education, through a book from the prison library, or the efforts of a Discharged Prisoners' Aid Society, he is not reformed by punishment at all."

ceration which is imposed as punishment. Furthermore, the deterrent element in punishment is not to be confused with the idea of reformation. An experience of the painful consequences of crime may deter a criminal from again violating the law, not because it shows him the immorality of his conduct, but because it demonstrates its inexpediency.

Utilitarian Theories of Punishment. — To a very considerable extent we have already presented the grounds upon which the other than retributive theories of punishment are based. The retributive theory stands *sui generis* in that it alone looks wholly to the past and rejects as unessential to, if not inconsistent with, itself all utilitarian considerations. In rejecting the retributive theory, therefore, we necessarily accept the utilitarian theory that punishment, to be justly imposed, must have for its aim the realization of some future good. These utilitarian theories differ from each other according to the nature of the good sought. Thus we have: (1) The Deterrent Theory, according to which punishments are inflicted in order that other would-be law-breakers may be dissuaded from crime; (2) The Preventive Theory, the aim of which, as its name implies, is to prevent the repetition of the offense by the surveillance, imprisonment, or execution of the criminal; (3) The Reformatory Theory, the object of which is the moral reformation of the delinquent; and (4) The Educative Theory, of which we have already spoken.

A point to be noticed about these theories is that they are not mutually exclusive. There is no reason why, the utilitarian idea being once accepted, we should not strive to reach in our penitential systems beneficial results in all four of the directions mentioned. It is, therefore, possible to speak of a given law being founded on one or the other of these ideas only in so far as deterrence, prevention, education, or reformation, as the

case may be, is placed in the foreground as the chief end to be realized.

But we may go further than simply to declare that these theories are not mutually exclusive. We may assert that it is rationally impossible to select any one aim and to declare that in any system of penal justice that one should furnish the sole motive for its enactment and enforcement. It may be possible to pass particular laws the aim of which is solely in one or the other of these directions; but to attempt the establishment of an entire criminal code with but a single aim would inevitably lead to absurdities and injustices. If absolute prevention were the sole aim, capital punishment or lifelong imprisonment would be the normal punishment called for; for in no other way could there be furnished a guarantee against a repetition of the offense by the convicted one. If reformation were the sole aim sought, then, not to mention other absurdities, it would be necessary for a court to release from all punishment those hardened and habitual criminals regarding whom experience had demonstrated penal law to be without a reformatory influence. If deterrence were accepted as the absolute canon, we would be obliged to abandon all attempts at reformation, and by the strictness and severity of our punishments give ourselves up to an appeal simply to the fears of mankind. Finally, if the educative theory were to be solely relied upon, we would not be able to modify the character and severity of our punishments so as best to meet threatened invasions of social or political order. This would mean that in times of greatest need the State would find itself powerless. Thus, for example, should a grievous pestilence be threatened, necessity would demand that violations of quarantine and other health ordinances should be prevented at all hazards, and hence that extraordinarily severe penalties should be attached to their violation. Or, again, in a time of great political unrest and disorder,

when the very life of the State is threatened, martial law would be demanded. But if we accept any but the deterrent theory as absolutely sufficient in itself, such measures would be unjustifiable. . . .

The one lesson, then, which all these facts teach us is that, for a solution of the problem of crime, the real effort must be to *abolish the causes of crime*, in so far as they are dependent upon conditions within our control. This means, in truth, entire social regeneration, for wherever there is injustice, there will be crime. Not all crime, it is true, may be ascribed to social causes. Some of it is undoubtedly due to the deliberate choice of evil minds or to the promptings of the passions. But with social justice everywhere realized, with economic and social relations properly regulated, and with true education, moral and moral, technical and academic, adequately applied, a long step will have been taken towards the solution of the grave evil we have been discussing. Though possibly exaggerated, there is yet substantial truth in the declaration of Ferri that "the least measure of progress with reforms which prevent crime, is a hundred times more useful and profitable than the publication of an entire penal code." [1]

A deterrent penalty only becomes operative in those cases where it has failed of effect. A reformatory discipline is only applicable where the subject of it has already been corrupted. An educative law presupposes an ignorant or biased mind. In very large measure the necessity for the enforcement of penal laws is a demonstration that proper preventive measures have not been taken. Fundamentally, then, any penal system is unjust in so far as the necessity for it might have been avoided by proper social conduct. Thus, as Green has said, "The justice of the punishment depends on the justice of the general system of rights; not merely on the propriety with reference to

[1] "Criminal Sociology," p. 135.

CHAPTER XLVIII

CRIMINAL RESPONSIBILITY: THE POPULAR AND THE PHILOSOPHICAL VIEWS CONTRASTED [1]

WHAT, then, is the end which we set before us? It is a threefold undertaking: to ascertain *first*, if possible, what it is that, roughly and in general, the vulgar [2] mean when they talk of being responsible; to ask in the *second* place, whether either of the doctrines of Freedom and Necessity (as current among ourselves) agrees with their notions; and, in case they do not agree, *lastly*, to inquire in what points they are incompatible with them. . . .

I. Betaking ourselves, therefore, to the uneducated man, let us find from him, if we can, what lies at the bottom of his notion of moral responsibility. What in his mind is to be morally responsible? We see in it at once the idea of a man's appearing to answer. He answers for what he has done, or (which we need not separately consider) has neglected and left undone. And the tribunal is a moral tribunal; it is the court of conscience, imagined as a judge, divine or human, external or internal. It is not necessarily implied that the man does answer for all

[1] [By FRANCIS H. BRADLEY: born, 1846; fellow of Merton College, Oxford, England.

His writings include: "The Presuppositions of Critical History" (1874); "Ethical Studies" (1876); "The Principles of Logic" (1883); "Appearance and Reality" (1893); "Essays on Truth and Reality" (1914).

The selection above reprinted is from his "Ethical Studies" (London: King & Co., 1876).]

[2] ["Vulgar" in England means "ordinary" persons, not "coarse" as in America. — EDS.]

or any of his acts; but it is implied that he might have to answer, that he is liable to be called upon — in one word (the meaning of which, we must remember, we perhaps do not know), it is "right" that he should be subject to the moral tribunal; or the moral tribunal has a right over him, to call him before it, with reference to all or any of his deeds. . . .

And he must account for all. But to give an account to a tribunal means to have one's reckoning settled. It implies that, when the tribunal has done with us, we do not remain, if he were so before, either debtors or creditors. We pay what we owe; or we have that paid to us which is our due, which is owed to us (what we deserve). . . . In short, there is but one way to settle accounts; and that way is punishment, which is due to us, and therefore is assigned to us. . . .

For practical purposes we need make no distinction between responsibility or accountability, and liability to punishment. Where you have the one, there (in the mind of the vulgar) you have the other; and where you have not the one, there you can not have the other. . . .

So far we have seen that subjection to a moral tribunal lies at the bottom of our answering for our deeds. The vulgar understand that we answer not for everything, but only for what is *ours;* or, in other words, for what can be imputed to us. . . .

Now the first condition of the possibility of my guiltiness, or of my becoming a subject for moral imputation, is my *self-sameness;* I must be throughout one identical person. . . . If, when we say, "I did it," the I is not to be the one I, distinct from all other I's; or if the one I, now here, is not the same I with the I whose act the deed was, then there can be no question whatever but that the ordinary notion of responsibility disappears. In the first place, then, I must be the very same person to whom the deed belonged.

And, in the second place, it must have belonged to *me* — it must have been mine. What then is it which makes a deed mine? The question has been often discussed, and it is not easy to answer it with scientific accuracy; but here we are concerned simply with the leading features of the ordinary notion. And the first of these is, that we must have an *act*, and not something which can not be called by that name. The deed must issue from my will; in Aristotle's language, the act must be in myself. Where I am forced, there I do nothing. I am not an agent at all, or in any way responsible. Where compulsion exists, there my will, and its accountability, does not exist. . . .

Not only must the deed be an act, and come from the man without compulsion, but, in the second place, the doer must be supposed intelligent; he must *know* the particular circumstances of the case. . . . A certain amount of intelligence, or "sense," is thus a condition of responsibility. No one who does not possess a certain minimum of general intelligence can be considered a responsible being; and under this head come imbecile persons, and, to a certain extent, young children. Further, the person whose intellect is eclipsed for a time — such eclipse being not attributable to himself — can not be made accountable for anything. He can say, and say truly, "I was not myself;" for he means by his self an intelligent will.

Thirdly, responsibility implies a *moral* agent. No one is accountable, who is not capable of knowing (not, who does not know) the moral quality of his acts. Wherever we can not presume upon a capacity for apprehending (not, an actual apprehension of) moral distinctions, in such cases, for example, as those of young children and some madmen, there is, and there can be, no responsibility, because there exists no moral will. Incapacity, however, must not be imputable to act or wilful omission.

No more than the above is, I believe, contained in the popular creed. . . .

To resume then: According to vulgar notions, a man must act himself, be now the same man who acted, have been himself at the time of the act, have had sense enough to know what he was doing, and to know good from bad. In addition, where ignorance is wrong, not to have known does not remove accountability, though the degree of it may be doubtful. And everything said of commission applies equally well to omission or negligence.

II. We have found roughly what the ordinary man means by responsibility; and this was the first task we undertook. We pass to the second, to see whether, and how far, the current theories of Freedom and Necessity (better, Indeterminism and Determinism) are consistent with his beliefs.

Let us first take the theory which goes by the name of the Free-will doctrine, and which exists apparently for the purpose of saving moral accountability. We have to ask, Is it compatible with the ordinary notions on the subject? "We must have liberty to act according to our choice;" is this the theory? "No, more than that; for that," we shall be told, "is not near enough. Not only must you be free to *do* what you will, but also you must have liberty to *choose what you will* to do. It must be your doing, that you will to do this thing, and not rather that thing; and, if it is not your doing, then you are not responsible."

So far, I believe, most persons would agree that the doctrine has not gone beyond a fair interpretation of common consciousness. . . . What is then liberty of choice? "Self-determination. I determine myself to this or that course." Does that mean that I make myself do the act, or merely that my acts all issue from my will? "Making is not the word, and very much more is implied than the latter. You are the uncaused cause of your particular volitions." But does not what I am come from my disposition, my education, my habits? "In this case,

certainly not. The ego in volition is not a result, and is not an effect, but a cause simply; and of this fact we have a certain and intuitive knowledge." . . .

In this bearing, Free-will means Non-determinism. . . . Freedom means chance; you are free, because there is no reason which will account for your particular acts, because no one in the world, not even yourself, can possibly say what you will, or will not, do next. You are "accountable," in short, because you are a wholly "unaccountable" creature. We cannot escape this conclusion. If we always can do anything, or nothing, under any circumstances, or merely if, of given alternatives, we can always choose either, then it is always possible that any act should come from any man. . . .

The theory was to save Responsibility. It saves it thus: A man is responsible, because there was no reason why he should have done one thing, rather than another thing. And that man, and only that man, is responsible, concerning whom it is impossible for any one, even himself, to know what in the world he will be doing next; possible only to know what his actions are, when once they are done, and to know that they might have been the diametrical opposite. So far is such an account from saving responsibility (as we commonly understand it), that it annihilates the very conditions of it. It is the description of a person who is not responsible, who (if he is anything) is idiotic. . . .

But here we have not to investigate the doctrine, but to bring it into contact with ordinary life. Let us suppose a man of good character, innocent of theoretical reflections. Put it to him, whether he was not aware that, on opportunities rising for the foulest crimes, he could not only do these acts if he would, but also that it was quite possible, in every case, that he should do them. Such a question, if asked, would be answered, I doubt not, by an indignant negative; and should a similar suggestion be made with

respect to a friend or relation, the reply might not confine itself to words. What sayings in life are more common than, "You might have known me better. I never could have done such a thing; it was impossible for me to act so, and you ought to have known that nothing could have made me"?

The doctrine of Free-will, then, does not square with popular views. Bearing in mind that, of "two great philosophies," when one is taken, but one remains, it is natural to think that Necessity, as the opposite of Free-will, may succeed in doing what its rival has left undone. Is this so? . . . Nothing is clearer than that the plain man does not consider himself any less responsible, because it can be foretold of him that, in a given position, he is sure to do this, and will certainly not do that; that he will not insult helplessness, but respect it; not rob his employer, but protect his interests; and, if this be admitted, as I think it must be, then it will follow that it cannot be *all* his actions, to the prediction of which he entertains an objection. So much being settled, we must ask, Is there no prediction then which he does find objectionable? I think there is. The prediction which is not objected to, is mere simple prediction founded on knowledge of character. What is the prediction which is objectionable? Would it be going too far if we said that the ordinary man would not like the foretelling of *any* one of his conscious acts, *unless* so far as they issued from his character? I do not think it would be. . . . The vulgar are convinced that a gulf divides them from the material world; they believe their being to lie beyond the sphere of mere physical laws; their character, or their will, is to them their thinking and rational self; and they feel quite sure that it is not a thing in space, to be pushed here and there by other things outside of it. And so, when you treat their will as a something physical, and interpret its action by mechanical metaphors, they believe that you do not treat

it or interpret it at all, but rather something quite other than it. . . .

III. Let us see, then, what punishment means first for the vulgar, and, next, for the believer in Necessity. Let us see for ourselves [1] if the two ideas are incompatible; and then inquire wherein they are incompatible, in case they are so.

If there is any opinion to which the man of uncultivated morals is attached, it is the belief in the necessary connection of punishment and guilt. Punishment is punishment, only where it is deserved. We pay the penalty, because we owe it, and for no other reason; and if punishment is inflicted for any other reason whatever, than because it is merited by wrong, it is a gross immorality, a crying injustice, an abominable crime, and not what it pretends to be. . . . Why then (let us repeat) on this view do I merit punishment? It is because I have been guilty. I have done "wrong." Now the plain man may not know what he means by "wrong"; but he is sure that, whatever it is, it "ought" not to exist, that it calls and cries for obliteration. . . . By fine or imprisonment or even by death, we annihilate the wrong and manifest the right; and since this Right, as we saw, was an end in itself, so punishment is also an end in itself.

Yes, in despite of sophistry, and in the face of sentimentalism, with well-nigh the whole body of our self-styled enlightenment against them, our people believe to this day that punishment is inflicted for the sake of punishment; though they know not more than our philosophers themselves do, that there stand on the side of the unthinking people the two best names of modern philosophy.[2]

[1] The reader must not consider me anxious to prove against a theory what it is ready to admit; but if we do not see the facts for ourselves, we shall not find the reasons.

[2] The following passages from Kant will perhaps surprise those persons among us who think nothing "philosophical" but immoral Humanitarianism. — Kant's "Werke," IX, 180, 183:

"Judicial punishment (poena forensis) is not the same as natural (poena nat-

We have now to see what punishment is for the believer in Necessity. And here the Necessitarian does not leave us in doubt. . . . For our Necessitarian, punishment is avowedly never an end in itself; it is never justifiable, except as a means to an external end. "There are two ends," says the late Mr. Mill,[1] and he means there are only two ends, "which, on the Necessitarian theory, are sufficient to justify punishment: the benefit of the offender himself, and the protection of others." . . .

But if, as we saw, to understand punishment is to understand responsibility; and if, further, the teaching of the Necessitarian with respect to punishment is in flagrant contradiction with vulgar opinion — how, if he were so minded, is he to assert that his teaching on responsibility is not so also? . . .

Our result so far then is this: We have seen what punishment for the vulgar and for the Determinist respectively are; and to see that is to see that they are altogether incompatible; and so in like manner the responsibilities, which correspond to them, are not the same. . . .

Our interest is mainly to see wherein it is that Necessitarianism fails to interpret the popular belief. It fails in this, that it altogether ignores the rational self in the form of will; it ignores it in the act of volition, and it ignores it in the abiding personality, which is the same throughout all its acts, and by which alone imputation gets a meaning. . . .

We said that our Necessitarians ignored the self, both

uralis). By means of this latter, guilt brings a penalty on itself; but the legislator has not to consider it in any way. Judicial punishment can never be inflicted simply and solely as a means to forward a good, other than itself, whether that good be the benefit of the criminal, or of civil society; but it must at all times be inflicted on him, for no other reason than because he has acted criminally. The penal law is a categorical imperative; and woe to that man who crawls through the serpentine turnings of the happiness-doctrine, to find out some consideration which, by its promise of advantage, should free the criminal from his penalty, or even from any degree thereof."

[1] Hamilton, p. 592.

as willing self and as self-same will. . . . Not only in the act of "I will" does Determinism entirely lose sight of the "I," and hence fail to recognize the characteristic of the will; not only does it hold by a will that wills nothing, and misses thereby an element involved in responsibility; but also, it ignores or denies the identity of the self in all the acts of the self, and without self-sameness we saw there was no possibility of imputation. . . .

We have dwelt too long on this matter. If the self is ignored in the psychology of our Determinists, or recognized in a sense which is not the vulgar sense, then responsibility and punishment and all the beliefs intellectual and moral, which hang from (as we have seen) and involve in their being the reality of the vulgar sense, with the non-reality thereof, fall and are destroyed; or survive, at most, in a form and a shape which, whatever and however much better it may be, is absolutely irreconcilable with the notions of the people. *A criminal* (in that view) *is as "responsible" for his acts of last year as the Thames at London is responsible for an accident on the Isis at Oxford*, and he is *no more responsible*. And to punish that criminal, in the vulgar sense, is to repeat the story of Xerxes and the Hellespont. It may be true that, by operating on a stream in one place, you may make that stream much better in all places lower down, and possibly also may influence other streams; but if you think that, because of this, the stream is punishable and the water responsible in anything like the way in which we use the words, then you do most grossly deceive yourselves. And our conclusion must be this, that of "the two great schools" [1] which divide our philosophy, as the one, so the other stands out of relation to vulgar morality; that for both alike responsibility (as we believe in it) is a word altogether devoid of significance and impossible of explanation. . . .

[1] ["Two great philosophical schools." An ironical reference to Intuitionism and Empiricism, with the implication unfair that the one must stand for the Free-will doctrine and the other for Necessitarianism.—EDS.]

If the drawing of morals be not out of the fashion it would seem that there are several morals, which here might well be drawn.

And the first is the vulgar one, that seeing all we have of philosophy looks away (to a higher sphere doubtless) from the facts of our unenlightened beliefs and our vulgar moralities, and since these moralities are what we most care about, therefore we also should leave these philosophers to themselves, nor concern ourselves at all with their lofty proceedings. This moral I think, on the whole, to be the best; though in our days perhaps it also is the hardest for all of us to practice. . . .

CHAPTER XLIX

THE MORAL REPROBATION THEORY OF PENAL LAW [1]

Morality as the Basis of Law. — Morality is an *active* principle — at least to a certain extent. The law can give to one the right to kill another, *e.g.*, can give the master the right to kill the slave. That which determines whether or not we exercise this right is not the law, but rather a morality, correctly or incorrectly understood, in accordance with which (whether *we will* it or not) we measure all our acts of which we are clearly conscious. Consequently the absolute principle of criminal law can be found only if we discover a moral basis in the law. It follows therefore that an act which violates the legal system is, as such, more or less immoral, either directly or indirectly.

Ethical Judgment, Especially Ethical Disapprobation, as a Necessary Element of Morality. — Now the nature of ethics is such that from the ethical or unethical character of each act it forms or seeks to form an opinion of others. From the acts of others and their consequences one acquires his own morality and the lesson for his own life.

[1] [By Carl Ludwig von Bar: born, 1836, at Hanover, Germany; died, Aug. 20, 1913; professor at Rostock, later at Breslau, and finally at Göttingen (1879–1913). He attained distinction for his writings on criminal law and international law.

The selection above reprinted is from his "Geschichte des deutschen Strafrechts und der Strafrechtstheorien" (1882), translated by Thomas S. Bell. The translation is the main part of the volume entitled "History of Continental Criminal Law" (Little, Brown & Co., 1916: Continental Legal History Series, vol.VI). The selection is from pages 376–395 (parts omitted).

For an account of the author's life and works see the editorial preface to the above volume, pages xxxiii *seq.*]

Where the actions of another display an aspect either strikingly in harmony or at variance with morality, moral judgment takes place uncontrollably, with the power of a natural impulse. The discovery of some especially grave crime, *e.g.*, an attempt to take the life of a highly revered ruler, causes this judgment to come into being with the irresistible force of a natural instinct; no hairsplitting distinctions [1] are able to limit or deprive the individual or the public at large of this moral judgment. . . .

Disapproval of an Act Entails Disapproval of its Author. — This disapproving judgment prevails primarily against the act. But of necessity it extends also to its author; for an act cannot be contemplated independently of its author. If the author is not known individually, there

[1] Binding, "Die Normen und ihre Uebertretung," I, p. 184, says that we may not derive law from morality and as proof of this he argues, first, that in the province of morality an unconditionally binding rule cannot exist — "unquestioning obedience to the so-called moral views of public opinion represents a very low degree of moral value" — since the ethical character of an act consists in its harmony with the conscience of its author; and, secondly, that the rules of morality are too changeable. To which the answer may be made that no intelligent man can confound public opinion, *i.e.*, in Binding's sense, "the fashionable opinion of the great majority" with established morality, *e.g.*, Christian morality as it is generally recognized. Such a shifting of the expression and the idea has no place in scientific investigation, and is a questionable method of polemic.

Taking up the last point, it is not true that moral opinions change so rapidly, "go up and down as waves," as Binding believes. On the contrary, they are far more stable than principles of law. The taking of excessive advantage of another's necessity, for example, has been long considered as morally reprehensible, while as is well known the law relative to usury has undergone many changes. Binding even confuses the moral rule with the comprehension by the same of the individual case. This inclusion of the act with those coming under the rule is frequently more difficult and is subject to more changes in "fashionable opinion" than in principles of law. Why this is so, appears later.

But as far as the sovereignty of the individual conscience is concerned, a thing disputed by Binding, this reproduction of Fichte's theory of morality is untenable according to the modern researches. The conscience of the individual is a product of history and of the morality of the entire nation. *Cf.* Hegel, "Philosophie des Rechts" (3d ed.), pp. 192 *et seq.*; Lotze, "Mikrokosmos" (3d ed.), II, pp. 308 *et seq.*; Alaux, "Ueber die Wandlungen des Moral im Menschengeschlechte" ("Vortrag," Basel, 1879); Baumann, "Handbuch der Moral und Abriss der Rechtsphilosophie" (1879); von Jhering in Schmoller's "Jahrbuch für Gesetzgebung," etc. (N. S., Vol. 6, 1882), pp. 1 *et seq.*; and especially in contradiction to Binding, see Jellinek, p. 123.

appears always in the act, although in hazy and indistinct outlines, a mental picture of the author. . . .

The Possible and Proper Methods of Expressing this Disapproval. — But this disapprobation in the abstract [1] does not reveal the manner of its concrete expression. It could possibly confine itself to the mere mental processes of the one disapproving; or on the other hand it could manifest itself in a destruction of the author, which except for this would be without purpose. . . .

The more doubt involved in the moral judgment of an act, the more reserved and the less manifest must be its disapproval. But, vice versa, in the case of obviously grave violations of morality, wherever there exists a moral community this judgment necessarily becomes a public one. For (as even Kant believes), morality is not a thing prepared for all times and exclusive of everything else; it is a product of the history of humanity and thus a product of the community. The moral judgment of the individual is founded upon tradition, upon the moral judgment of others. This necessarily presupposes a certain communication of the moral judgment, without which tradition would be impossible — in other words, it presupposes a certain *publicity* of the moral judgment. Here again logic is in accord with the actual facts. In the case of grave violations of morality, in the case of serious

[1] Seber, "Gründe und Zwecke der Strafe" (1876), p. 11, regards the principle of disapprobation as not sufficient. Although it can be conceded that the inviolability of certain fundamental maxims of morality must be continually emphasized, he believes proof was yet needed that this emphasis can be made *only* by punishment. However, this proof is lacking in Seber's own arguments, which (p. 19) amount to a paraphrase of my own, yet (*cf.* especially p. 29) with the elements of uncertainty that with the fundamental principle of criminal law — emphasis of certain fundamental moral principles — there are coördinated the principles of deterrence and reformation. The result is that in reality the asserted principle loses its true meaning and can with difficulty be distinguished from a moderate principle of deterrence. The proof desired by Seber is already furnished, if it is proven that in general punishment is requisite. There is no need to show that punishment is absolutely necessary in each individual case, since the law must as a rule ignore the special features of the individual case. And this is certain, that if criminal justice should at the present time suspend its functions, morality would thereby receive its death blow.

crimes, public disapproval, as already remarked, manifests itself irresistibly. *Public disapproval* therefore, in a manner more or less formal or informal, is within certain limits and in certain cases the necessary attribute of morality; and since without morality (as will be at once conceded), a human community could not exist and the progress of humanity would be altogether impossible, the public disapproval of certain acts contrary to morality is an unconditional right. . . .

Accordingly *every* expression of disapproval, even where it involves complete destruction of the offender, or any other conceivable injury to him as an expression of this disapproval,[1] is justice in respect to the offender: "Jus læsi infinitum." . . .

The more firmly the moral system is established, the less vigorous need be its expression of disapproval, — for in many respects this is supplanted by the natural reaction of the moral system. If the thief has difficulty in finding some one to receive the stolen goods, because general honesty subjects the title of a vendor to a scrupulous test, theft hereby comes to be something which in most cases does not profit the thief but is only to his detriment. If to the cheat, the swindler and the conscienceless speculator, the doors of the homes of honorable people (who form by far the great majority) are closed, then in many cases the expression of formal disapproval is perhaps superfluous. Consequently punishments become milder as civilization increases,[2] *i.e.* a civilization which signifies an

[1] *Cf.* also C. L. Von Haller, "Restauration der Staatswissenschaften," II, c. 34. On this point I modify my earlier view. I had found a justification for the violation of the sphere of rights of the individual in this, viz.: that in other cases (*e.g.* in war) the individual may be sacrificed for the sake of the community ("Grundlagen des Strafrechts," p. 76). But such cases are different. The individual and his property may be sacrificed only in so far as voluntary acquiescence would be of *service*. Punishment is essentially coercion. This applies especially against the attempt at a justification of punishment in Ed. Hertz, "Das Unrecht und seine Formen" (1880), p. 48.

[2] There is even recognized in the German Criminal Code a punishment (frequently used in England) which consists entirely in public disapproval, — *repri-*

advance not only in knowledge and refinement of enjoyment but also in morality. It is possible that in an ideal state of society the individual criminal might be left simply to the consequences of his own crime; or there might be applied the principle: Overcome evil not with evil but with good. Thus punishment, regarded as disapprobation, may be reconciled with Christianity, but regarded as retribution through human agencies, it is fundamentally the opposite of Christianity. For (as even Kant has fairly and candidly shown) the principle of retribution never permits forgiveness.

Various Phases of Disapprobation as Punishment. — In order that the disapproval of an act (and consequently of its author) may have that ideal effect of confirming the morality of those disapproving, it is necessary that the determination of the act and of its author be as exact as possible. Therefore a punishment inflicted upon a man innocent (or generally believed to be innocent) does not have the moral effect of punishment. Fear can be spread through the venting of rage against innocent people. But where a people is not completely enervated the ultimate effect of this fear will be directed against its author. A *just* punishment, however, strengthens the position of the legal system.

Moreover, it is in harmony with the character of punishment as disapprobation that in countries where there is a high degree of culture and refinement of feeling the trial and condemnation of the criminal constitute a part, and often a very important part, of the punishment.[1] If punishment were necessarily an external evil, there

mand. Hugo Meyer, § 5, maintains that the essence of reprimand is not disapproval of the act but rather of its author (*i.e.* thus a mild form of suffering). However, this assertion is in itself a "petitio principii," and if reprimand is not a "humiliation of the offender" only secondarily, then why are all the special forms of humiliation therein eliminated? Why is the pillory not to-day a desirable form of punishment?

[1] This opinion expressed by me in the "Grundlage des Strafrechts," p. 4, had been advanced by Heinze, p. 326, as stated above.

would be no explanation of the fact that in concrete cases the punishment may consist merely of a money fine or a few weeks' imprisonment.

The character of punishment, regarded primarily as disapprobation of the criminal act (and only secondarily as disapprobation of its author), makes it necessary that the expression of disapprobation be directly attached to the act itself as portrayed by the trial, — in other words, makes it necessary that the judicial sentence, which is nothing other than the fixing of the act in the minds of the public, substantially specify the punishment. It is contrary to the nature of criminal law to attempt in general to determine the punishment later, after observation of the character of the convict. We would say nothing here of the hypocrisy of prisoners, their unmanly actions, and their deceit toward prison officials. These are unfortunate conditions to which rise is given by the foolish modern movement (so totally at variance with history) to eliminate from the judicial sentence the fixing of the amount of the punishment, and to allow the duration of the punishment to be fixed later, after observation in the prison, or to remain for a time undetermined. As previously stated, the sentence of the criminal court *could* contain an abstract significance, without having an actual result of a penal nature; but in this case the actual result of the evil act should be affixed publicly and be of general application, — at least it should be fixed independently of anything else. The judicial sentence loses its influence upon the mass of the people when the actual result of the act is connected with something else, *i.e.* when it depends upon the discretion of prison officials which is not manifest to the public and which cannot be publicly verified. The individual criminal may be reformed, to the heart's desire, but among the masses of the people crime will continue to flourish. However, if the punishment were actually retribution of evil, *i.e.* of the wickedness of the criminal, then no objec-

tion could be raised to first making a long observation of this wickedness, since the deed of the criminal does not afford an adequate criterion for its accurate measurement.

Furthermore, the punishment of disapprobation can never be supplanted by suffering which comes upon the criminal as a matter of chance, even if this is a result of the crime and reveals (as they say) the "hand of God." If a thief breaking into a house falls from a ladder and as a result of the fall becomes a cripple for life, we would not for this reason spare him from punishment any more than we would the highwayman who lost an arm or his sight as a result of the vigorous defense of his opponent. If temporal punishment were merely the representative of divine punishment, then in such cases it would be presumptuous to desire further punishment. If it were the retribution of evil with evil, then in such cases, to punish would be senseless.

The True Purposes of Punishment. — The essential matter is *active disapproval* rather than the pain of the criminal. Therefore, whether or not the criminal in the individual case finds the punishment an evil makes no difference. He may even regard it as a benefit, — as *e.g.* perhaps in these times a criminal, who is not completely pernicious, regards with favor the prison which keeps him from further wrongdoing and furnishes him instruction. We should not for this reason change the punishment, so as to cause him suffering. . . .

However, the treatment of the offender must always be expressive of disapproval; and so far, but only so far, it is proper that the punishment should contain a disadvantage for the condemned. Criminals should not constitute a favored and pampered class (this is a consideration which obviously opposes the extreme deductions of the theory of reformation), although other praiseworthy purposes might be better attained through such good treatment.

The distinction must always remain, that as a general thing it is preferable *not to be punished*. A penal institution must never assume the character of an institution for instruction. However great may be the attention given to purposes of reformation, and consequently to the individual criminal, this attention is only a secondary one. The primary element is attention to the necessity of public disapproval (or if one prefers so to term it, repression).

The objection can always be raised — and in fact has been raised —that disapprobation contains nothing that makes its *practical* application necessary — at least not in the form of criminal procedure, and even less in the actual infliction of the punishment. If only disapprobation were involved, one might in legislation go no farther than to set up general principles which would disapprove of one act or another. However, in this objection it has been overlooked that there would be no recognizable inclusion of the act under these general conceptions or principles. It is the vengeance of the injured party, the punishment inflicted by the State, which first declares that this *concrete* act deserves disapproval and is absolutely reprehensible. This immediately becomes clear if one considers that there may be various grounds of extenuation for acts which possess the external elements of crime. A concrete act does not actually become a crime until this character is, as it were, stamped upon it by judicial decision. The reason why one at the present time is able to conceive that a judicial decree is not necessary in order for certain acts (*e.g.* aggravated cases of murder, etc.) to be regarded as crimes by the public at large, is that one forgets the long tradition of judicial decrees which obtains as a decision for the individual case in advance of the actual decision. It would soon become otherwise if the giving of judicial decisions concerning individual criminal cases should be generally discontinued. . . .

Summary. — Summing up the foregoing statements, the purpose of criminal law is as follows: "Certain fundamental principles of morality should be publicly and notoriously characterized by the civil community as inviolable by attaching to actions which are contrary to these principles an impressive mark of disapprobation. This mark also necessarily affects the author of the action, since a deed and its author cannot be contemplated separately. This is simply a result of the fact that the civil community is obliged to give practical recognition to the fundamental maxims of morality."

As soon as the purpose of punishment is no longer directed towards the person of the criminal, but rather society or the community is regarded as that which is aided or protected by the punishment, and the criminal is regarded merely as something incidental — which he certainly is, as contrasted to the community — this theory necessarily gains favor.

The theory of Reformation treats the criminal as the chief goal towards which the purpose of punishment is aimed. It is the same with the theory of Retribution. According to the latter, the *criminal* should receive the desert of his acts in the punishment.

The Deterrence theory is the only one which harmonizes with our view in regarding society, and not the criminal, as the chief issue. But, on one hand, it takes too mechanical and base a view of the relation between the criminal and society, and on the other hand it pays too little attention to history. It is quite proper, however (as Hugo Meyer also maintains), to ascribe the first place among the relative theories to the purpose of deterrence (or, as we prefer to say, of *turning away*) the public from crime. Criminal legislation which, in respect to its means of punishment, is based upon the deterrent theory, is at any rate, as history shows, capable of existing; but legisla-

tion which is based exclusively and consistently upon the theory of reformation would soon render itself impossible.

Moreover, credence may not be given (as is done by the theory of deterrence in its too base conception of the purpose of criminal law) to the belief that the criminal law has its chief effect upon the criminal world or those who are irresistibly disposed to crime because of evil training, degeneracy, etc.; or that passion which has become strong and overwhelming can be held in check through the existence and operation of a criminal statute. In this respect the objections to the deterrent theory are rather well taken. Fear of an indefinite although severe future evil can but seldom counteract the impulse to crime. Therefore, it is a great mistake, in times when grave crimes are prevalent, to expect any very important result from liberal use of capital punishment, flogging, etc. The history of the 1700s illustrates the result of a harsh criminal system destructive of sentiment. The truth is rather as correctly pointed out by Schopenhauer, with that clearness of vision which he displays in so many particulars. He says that perhaps the chief effect of criminal legislation is that, upon the whole, it *preserves the morality of the better elements* of the people; that true criminal punishment is that which brings about "exclusion from the great freemasonry of honorable people," and that public opinion judges a single misstep with great and perhaps too relentless severity.[1]

[1] "Grundprobleme der Ethik" (2 ed., pp. 187, 190). Lieber (p. 479) says that *insecurity* is not the worst evil resulting from frequent non-punishment of grave crimes, or as we would add, actions deserving punishment, but rather the general lowering of the moral standard. For this reason, although not for this reason exclusively, the certainty of punishment is more important than its amount. The fact that a thing *will* be punished is more important than *how* it will be punished. Naturally this principle must be taken "cum grano salis."

CHAPTER L

PUNISHMENT AS A CULTURAL PHENOMENON [1]

Crime is an inevitable social evil, the dark side of the shield of human progress. The sifting processes of natural selection continue within the domain of social life, rejecting, through social pressure, both weaklings and workers of iniquity. Anti-social individuals, or malefactors, result from the persistent tendency to variation, manifest in all life. They become criminals through processes of social selection, during which individuals refusing to live up to the social standard of right action are punished by the community, and their actions become known as crimes. Anti-social acts occurred probably long before the punishment of such conduct by the social group; certainly ages before there was any recognition of acts as wrongs against society. Originally the forms of anti-social conduct were very few in number; they have become many with the progress of civilization. The great majority of acts now punished, and rightly punished, as crimes by modern nations, either are unknown among low savages, or are not considered as wrong and immoral. Very often such acts are not really evils in a low stage of social development. Certainly they are not punished by the social group as wrongs against itself; they have not yet become crimes. To this extent, therefore, crime is a social product; — not that anti-social conduct is a product of social forces, but that society has been compelled to enlarge continually

[1] [By Arthur Cleveland Hall.
The selection above reprinted is from his "Crime in Its Relation to Social Progress" (N. Y.: The Macmillan Co., 1902: Columbia University Studies in History, Economics, and Political Science, vol. XV), pages 376–395 (parts omitted).]

its categories of anti-social acts, to broaden out persistently the field within which certain acts are prohibited as injurious to the social welfare, and to punish as criminals the increasing number of the disobedient, who refuse to submit themselves to this ever-extending social pressure. The increase of crime, which is due to wise changes in the criminal law or its administration (induced by a rising social standard of right action), without any increase of anti-social conduct, promotes civilization and tends to social betterment; but, statutes and administration remaining the same, an increase of crime must mean an increase of anti-social conduct, which assuredly does not promote civilization.

Society's conflict with the criminal is one of the chief factors in social evolution, and since the field of this conflict has broadened down the ages, it is but natural that crime has tended to increase, and in fact has increased with the growth of knowledge, intelligence and social morality. This increase of crime largely takes the direction of acts in opposition to new social prohibitions, which are neither accidental nor whimsical, but inevitable consequences of the increasing complexity of life. In general, new crime follows lines of greatest resistance to the new life of society.

The preservation of life upon the earth and its gradual upward development have resulted, even in the lowest animal forms, from the operation of two great, unchanging, ethical principles, or laws of growth.

The first is the fundamental law of adult life. It is the law of self-support, of self-interest, of earned benefits. "Whatsoever a man soweth, that shall he also reap." The adult must in general take the consequences of his own character and conduct — the survival of the fittest resulting.

The second of these great principles may be called the law of the family. It is the primary law of self-sacrifice,

the law of unearned benefits to offspring immature and helpless, without which the species must inevitably perish.

Every kind of living creature must yield obedience to these laws, or degenerate and disappear from the earth. This is true equally of the social and the unsocial forms of life. Disobedience, however ignorant and unintentional, means death. . . .

Later than the laws of the family and of adult life appears another great ethical principle, nature's great secondary law of self-sacrifice, the law of society, the law of mutual benefits; which is perhaps best expressed in the words: "Do unto others as ye would they should do unto you." Far more and different qualities are required in an individual to fit him for life in a community than will suffice for welfare in isolation. The social being must not only care for himself, his own life and that of his mate and offspring, but he must help care for others also, his comrades, and in supplying his own wants must not interfere seriously with the like opportunity of others to supply their wants. Thus the liberty of each to develop and strengthen himself fully is limited by the necessity for a like liberty for all. Without obedience to this law social life is an impossibility. From the pressure of these laws upon each social group, and the adjustment of their antagonisms, results the criminal class, the creation of ever more numerous forms of crime, and the persistent increase of criminality upon the earth. The most civilized and progressive states have the most crime, and more crime as civilization increases; and this seeming multiplication of evil is not a sign of degeneration and decay, but of prosperity and upward growth to higher planes of life, of love, and mutual helpfulness. . . .

The most successful forms of life are gregarious; they have become social, and by the sharing of each other's dangers, joys and pains, have grown stronger, more intelligent, more loving. As intelligence develops, the

period of youthful immaturity grows longer, the young are more helpless and need a more extended training, the demands of the primary law of self-sacrifice become larger and more exacting. . . .

A social group is fundamentally a kindred group. Its members feel a resemblance among themselves, and a sense of safety and of pleasure develops. There is general likeness with individual variation. A social type is being formed. Divergence from this type is disliked, and antagonistic variation meets with conscious or unconscious persecution. "Relatively unintelligent though they are," writes Herbert Spencer, "inferior gregarious creatures inflict penalties for breaches of the needful restrictions, showing how regard for them has come to be unconsciously established as a condition to persistent social life. No higher warrant can be imagined," and therefore we may accept "the law of equal freedom as an ultimate ethical principle, having an authority transcending every other."

Morality seems in its beginnings to have been social rather than individual, a morality of action rather than a morality of motive. The moral act, the good act, is that which conduces to the social welfare. The good individual is he whose conduct aids his social group. Morals, ethics, Sitten (German), all mean habits, customs, established ways. The moral act was originally the customary act. Ultimately nature judges and chooses between social groups; those which obey her laws prospering, and those which disobey degenerating and disappearing from the earth. . . .

With increasing intelligence, and with growing interdependence of social life, there is a progressive enlargement of ethical view, and a widening and strengthening social demand that the individual shall live up to this higher morality, avoiding more and more actions seen to be socially harmful, and imitating more and more fully the growing ideal of the social type. . . .

This is the explanation of crime and of the necessity for its punishment. Individual variations, actively antagonistic to the prevalent social type, exist in all the higher social groups. Commonly they are social laggards, who have not kept pace with the average development toward the social ideal. The rebellious social laggard is the true criminal; other laggards belong to the pauper class. Even the higher animal societies collectively punish the most dangerous anti-social acts. Much the same conduct, with a few additions, is punished by the lowest human societies now known upon the earth; and, as social life attains to higher planes, more and more actions become socially harmful, are generally recognized as such, and added to the list of crimes — that is, the list of actions which society punishes as wrongs against itself, for the sake of the general welfare, for the preservation of the social life, for the elevation of the individual toward the ideal of the social type.

Thus the production of crime and criminals is one of the saving processes of nature, substituting a lesser for a greater evil, promoting upward progress at a smaller cost. For if nature had not induced this increasingly severe social selection and pressure within the group, toward the elevation of the individual and the improvement of the type, then that primitive and unreasoning form of pressure from physical forces without the group, which always persists, must have continued alone in operation, destroying countless individuals and groups, without, if we may so express it, the attempt to educate them into the true lines of their upward development. . . .

The criminal is the man who obeys too completely the commands of nature's first primary law — the law of self-interest, of irresponsible self-development. Often he is the man of the uncurbed ages, when brute strength and unscrupulous cunning were more important, and persistent self-seeking more justifiable than now. The strongest

always rules, and it is well for the world that it should rule, for the strongest is in general the best — the least bad where all now seem to us to have been very bad. But the nature of strength has changed, or rather, new and higher forms of strength have appeared continually, and this process will continue, higher strength being accompanied by a higher morality. . . .

In modern times the great civilizations of the world have been taking a more and more industrial and democratic character. New life, upward growth, is largely in this direction. New forms of crime are mainly industrial and social. Laws of forgery and fraud and fraudulent bankruptcy, statutes creating new forms of theft, factory and mines acts, and other legislation of social guardianship, prevention of cruelty to children and animals, education laws, prohibitions of multitudinous little annoyances and damaging acts, the criminal prosecution of drunkenness — all such are manifestations of the rising standard of our recognized duty to our brother man, and are most influential in raising that standard still higher, and in stimulating the lagging members of the community to a more healthy, more social, more truly moral life. . . .

Although the progressive welfare of the individual may be considered as the great end of life, yet the preservation and prosperity of the social group must take precedence of the preservation of the individual, for membership in a community is the chief means for his upward development and wellbeing. The occasional destruction of an individual, or even of many individuals, may be necessary for the welfare of the social group. Such losses may be inflicted by foes without, through warfare, or they may be inflicted by the community upon itself through punishment. In either case society not only has the right but is in duty bound to sacrifice the individual for the general welfare. The death penalty for heinous crime is as justifiable, if society deem it necessary for its wellbeing, as is

the demand upon the citizen-warrior to meet death upon the battlefield, or upon the doctor to remain steadfast at his duty in the plague-stricken city. The good of society is the prime reason for the punishment of criminals, and their reformation is justifiable only when it conduces to this end.

As an ethical standard, the law of adult life, if unlimited, certainly teaches the duty of the individual to grow strong by securing for his own use all possible good things of life, irrespective of the welfare of others — might making right. Nature's first limitation to this rule of selfishness is found in the imperative necessity for the care of offspring: a limitation enforced among the lower animals by insensate physical forces around them. The second great limitation is found only within social groups, and is enforced through the mediation of social beings, largely through social punishment. . . .

It is the old, old problem of the rights of the individual versus the welfare of society. Some liberty must be permitted, the individual must have the opportunity to grow, to develop his powers, individuation must continue. On the other hand, even in animal communities there are some restraints upon the noxious waywardness of individuals, and with higher evolution these social demands become ever more numerous, and society more sensitive to inner harms, more able and ready to punish for them. Not only does the criminal law cover an ever widening field of duties of the citizen to the state, and also to his fellow citizens, because an injury to one becomes, and is recognized as being more and more an injury to all, but the duty of parents to children is defined and largely regulated by criminal statutes. Society is no longer contented with negative commands, it enjoins positive duties also; — not only, thou must not kill or cripple thy child or fellowman, under penalty of punishment as a criminal; but also, thou must have thy children educated, thou must guard

thy operatives in factory and mine from all unnecessary dangers. There must be a progressive equilibrium established between the rights of the individual and the needs of society, between a man's duty to himself and his duty to his fellow citizens. The rights of one must be balanced continually with the rights of all, for only in this way can persistent, yet conservative progress be assured. The nation that does this is the nation that advances continually in civilization, strength, morality and leadership upon the earth. . . .

But this ever nicer adjustment of mutual rights and duties means constant friction, and constant education by new social prohibitions, increasing forms of crime, and inducing multitudinous acts of petty rebellion (*i.e.*, crimes) against society. For penal laws are not enacted and enforced unless the need for repression is recognized, and opposition will probably be more frequent in a community in proportion to its progressiveness, and to the extent of individual liberty enjoyed; that is, in proportion to the opportunity for variation and individuation in obedience to nature's great primary law of self-development. It takes time and hard pressure to convince men fond of freedom that conduct, until recently considered harmless, is bad and must be abandoned.

Nature thus compels nations to make selection of a progressive social education, and to enforce it by group pressure. A wise social education means strength, civilization, happiness, leadership; an unwise, means weakness, decadence, and national death. . . .

Crime, therefore, results from the limitation of nature's law of self-interest by her altruistic laws. The anti-social individual who will not submit himself to these limitations, but insists upon acting in opposition to social necessity, he is the typical criminal. Increasing crime is a direct consequence of the enlarging spheres of operation of these two great ethical principles or laws, necessitating care for

family and mutual helpfulness among fellow members of a community; in other words, it results from the growth of civilization, the development of knowledge, intelligence and social morality. The demands of a nobler fatherhood, of a grandly widened sense of brotherhood, have resulted in a continued multiplication of social prohibitions, and an ever larger host of criminals, punished that society may grow aright, that true liberty may be secured to the great majority of citizens to develop their powers fully under the shield of law. Crime is the reaction against growing pressure toward a higher altruism, a larger mutual helpfulness, a nobler, stronger civilization. It is part of the price we are paying for this growth to better things.

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